United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

B

74-1811

P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS D'AMATO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS
FILED
JUL 19 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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DOCKET ENTRIES

JUDGE GAGLIARDI 73 CRIM. 1093

THE UNITED STATES

vs.

ROBERT DONOVAN, a/k/a George Zimmer - 1 & 2
DENNIS D'AMATO - all counts

PROCEEDINGS

12- 4-73	Filed indictment. (Referred to Judge Gagliardi as superseding 73 Cr 577.
12-18-73	BOTH DEFTS - plead not guilty, before Judge Gagliardi - jury trial begun.
12-19-73	Trial con't & concluded. Pre-sentence investigation ordered for sentence 2-20-74 at 9:30 AM. Both defts released on own recognizance. Gagliardi, J.
2-13-74	D. D'Amato - filed notice of motion re: dismissal of count 3, ret. 2/27.
2-13-74	D. D'Amato - filed memo of law in support of motion to dismiss ct. 3.
5-28-74	DENNIS D'AMATO - (atty present) Filed Judgment - Deft is sentenced to the custody of the Atty Gen'l for imprisonment for a period of SIXTY (60) DAYS. Execution of prison sentnece (sic) is suspended and the deft. is placed on probation for a period of EIGHTEEN (18) MONTHS, subject to the standing Probation order of this

	Court. Gagliardi, J. 5/30/74 Issued copies. ent. 5/20/74
5-28-74	ROBERT DONOVAN - (atty present) Filed Judgment - Deft is hereby committed to the custody of the Atty Gen'l or his authorized representative for imprisonment for a period of ONE-HUNDRED and TWENTY (120) DAYS on each of counts one (1) and two (2) concurrently. Counts 1 and 2 to commence upon expiration of confinement, subject to the standing probation order of this Court. Deft. is cont'd on present bail pending appeal. Gagliardi, J. 5/30/74 Issued commitments. ent. 5/20/74
5-29-74	D. D'Amato - filed notice of appeal from judgment dtd 5/28/74. Mailed copies. to: La Rossa, Shargel & Fischetti, U.S. Atty.
2-18-74	R. Donovan - filed notice of motion re: judgment of acquittal, etc.
2-18-74	R. Donovan - filed memo of law on deft's post-trial motions.
5-30-74	Filed Govt's memo of law in opposition to motion for judgment of acquittal.
5-30-74	Filed MEMO-END. on motion dtd 2/18/74. Deft. Donovan's motion is denied. Gagliardi, J. mailed notice.
5-30-74	Filed MEMO-END. on motion dtd 2/13/74. Deft. D'Amato's motion is denied. Gagliardi, J. mailed notice.
6- 3-74	Donovan - filed notice of appeal from judgment dtd 5/28/74. mailed copies.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

- v -

73 Cr. 1093

ROBERT DONOVAN, a/k/a George Zimmer and DENNIS D'AMATO,

Defendants.
----------X

The Grand Jury charges:

1. From on or about the first day of December, 1971, up to and including the date of filing of this indictment, ROBERT DONOVAN, a/k/a George Zimmer, and DENNIS D'AMATO, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and to sell, dispose of, distribute, supply, furnish and procure for unlawful use counterfeit and spurious articles.

2. It was a part of said scheme and artifice that ROBERT DONOVAN, a/k/a George Zimmer, would purchase and cause to be

purchased over 27,000 jars and jar caps which were of the same size and type as those used in the manufacture of a hair conditioner and dressing called Ultra Sheen and would cause the said jars to be printed with a label identical in form to the label used on bottles of the true and genuine Ultra Sheen sold by Johnson Products Co., Inc.

3. It was further a part of said scheme and artifice that DENNIS D'AMATO would procure and obtain possession of counterfeit and spurious jars of Ultra Sheen and would thereafter sell said jars as the true and genuine Ultra Sheen.

4. On or about the dates hereinafter set forth, in the Southern District of New York, for the purpose of executing such scheme and artifice and attempting to do so, ROBERT DONOVAN, a/k/a George Zimmer, and DENNIS D'AMATO, the defendants unlawfully, wilfully and knowingly did place and cause to be placed in a post office and authorized depository for mail matter to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom, and did knowingly cause to be delivered by mail according to the direction thereon, the matters and things hereinafter described:

Count	Date	From	To	Matter
1	January 18, 1972.	Carr-Lowery Glass Co., Inc. 415 Madison Ave. New York, N.Y.	Zimmer & Associates 1500 Main St. Port Jefferson, New York	Letter
2	February 17, 1972	Zimmer & Associates 1500 Main St. Port Jefferson, New York	Carr-Lowery Glass Co., Inc. 415 Madison Ave. New York, New York	Purchase Order

(Title 18, United States Code, Sections 1341 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 8th day of August, 1972, in the Southern District of New York, DENNIS D'AMATO, the defendant, in a matter within the jurisdiction of a department of the United States, to wit, the United States District Court for the Eastern District of New York, unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements and representations in an "Affidavit" to wit, that he had purchased 1,130 dozen jars of Ultra Sheen hair conditioner in October, 1971, from a company called Balzac Trading and had sold that Ultra Sheen to the customers listed in the affidavit, whereas in truth and in fact, as the defendant then and there well knew, such statements were false, fictitious and

fraudulent.

(Title 18, United States Code, Section 1001)

FOREMAN

PAUL J. CURRAN
United States Attorney

AFFIDAVIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
JOHNSON PRODUCTS CO., INC.,

Plaintiff,

v.

Civil Action File
No. 72C 1009

BRODT & CO., INC., JOMAR DISTRIBUTORS, INC., AARON S. BRODT, DAVID BRODT, DENNIS D'AMATO, "JOHN DOE", "JOHN DOE", "JOHN DOE" and JOHN DOE",

Defendants.
----------X

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

DENNIS D'AMATO, being duly sworn, deposes and says:

1. I am a co-defendant in this action and reside at 63 Oneida Avenue, Centereach, New York. I am also the sole owner, President, Director and sole employee of defendant, Jomar Distributors, Inc. Said defendant corporation was organized pursuant to the laws of the State of New York on or about April of 1972, and is located at my residence address, 63 Oneida Avenue, Centereach, New York.

2. Prior to April of 1972 and for approximately two years prior thereto, I conducted my business, which consists of the buying and selling of job lots and closeout merchandise

under the trade name of Metro Shop Supply Co., also located at my residence address, 63 Oneida Avenue, Centereach, New York.

3. I am now 24 years of age and have resided at my present address for the past four years, since my marriage. I had worked for a short period for the Long Island Transmission Company located in Hicksville, Long Island, doing stock work for them prior to going into my own business in 1969.

4. I conduct a one-man business, dealing with products that I buy from discount dealers and sell to discount stores, drug stores, variety stores and on occasion to other suppliers. Most of my business is conducted on a COD basis. I work out of a delivery van by which I see my customers and make deliveries.

5. I can state without qualification that I have none of the Ultra Sheen product, referred to in the subject Complaint, in my possession. Moreover, I have no way of knowing whether any of the Ultra Sheen product which I had purchased in October of 1971 was manufactured, packaged and distributed by the plaintiff in this action, or by some other company using a false and fraudulent label. I have no objection to the injunction which plaintiff requests in this action. My sole purpose

in making this affidavit, is to deny the allegations of the mvokg affidavits which accuse me of conspiracy, fraud and counterfeit, and to reveal to the Court and to the plaintiff, the background and source of my connection with the product and the customers to whom it was sold.

6. I state unequivocally that at the time I purchased the product marked "Ultra Sheen", in October of 1971, I had never previously heard of the product, I had never seen the product, I had no familiarity with the product, I had no knowledge of the manufacturer of the product and I had no suspicion or reason to suspect that the product which I purchased was a fraud or counterfeit, or that the labels and markings on the product were placed there in violation of any registered trademark or of any law. I did not suspect, and had no reason to suspect, that it was not made by Johnson Products Co., Inc., the plaintiff in this action.

7. The circumstances under which I first purchased this product are as follows:

I was in conversation with a storekeeper, on Flatbush Avenue in Brooklyn in the area of Nostrand Avenue, chatting about business conditions with him. I told him I was a young

fellow getting started in this business, and would be interested in expanding my line. He suggested a supplier who could furnish me with merchandise at a good price. I told him I would be interested, and he thereupon telephoned the supplier, referring to him as "Sam Soane". After the telephone conversation, he advised that Mr. Soane will have one of his salesmen meet with me at the same store in about twenty minutes. When the salesman arrived, he introduced himself to me as "Richie". Richie was also a young man and tried to be helpful. He suggested that I try a product which he called "Ultra Sheen". I had never heard of the product before, and inquired further. He explained it was a hair conditioner used by black people, and that it was a good seller if I had that type of clientele. He offered to sell it to me at $14.50 a dozen, adding that his company had purchased it from the manufacturer at a good deal, and that although the manufacturer was presently selling it for about $14.75 a dozen (there are a dozen to the case), most of the stores did not deal directly with the manufacturer, so that I could probably resell it at $15.25 per case. I said I would inquire around as I completed my route that day, and let him know the same afternoon. We arranted to meet at the

same location at 5 P.M. that same day.

8. During that day, I managed to sell about eighty cases at $15.25 per case, and when I met Richie that afternoon, I placed an order with him for 150 cases at $14.50 per case. These were delivered to my home, from where I conduct my business, using my attached garage for storage purposes. In accordance with his demand, I paid cash on delivery.

9. During my conversation with Richie, on the same day that I had ordered the 150 cases, he asked me if I had any merchandise that I would be interested in selling to him. I told him I had about 900 dozen Sylvania Magicubes (flash cubes for cameras). He said he would let me know, and suggested that I meet him at the same location (Flatbush near Nostrand in Brooklyn) a few days later. When I met him again, he placed an order for the 900 dozen flash cubes, and in turn I ordered 980 dozen jars of Ultra Sheen.

10. I had asked Richie for an invoice covering the first transaction (for 150 cases), but was told that that would require additional paper work for his company and, therefore, they would have to charge me an additional 50¢ per dozen. Accordingly, I accepted delivery of the first 150 dozen without

a bill. With respect to the second transaction for 980 cases, however, I told him I would have to give him a bill for the flash cubes and would require a bill from him giving me credit upon my purchase from him of the 980 cases of Ultra Sheen. He agreed and complied.

11. Annexed hereto are copies of invoices (the originals of which are in my possession and will be produced on the return date of this motion), showing the purchase by me of 980 cases of Ultra Sheen and my sale of the same, as follows:

Exhibit I - Invoice received by defendant Dennis D'Amato (then doing business under the trade name of "Metro Shop Supply Co."), on October 17, 1971, when he purchased and received delivery from Balzac Trading of 980 dozen jars of Ultra Sheen, purchased at $14.50 per dozen for a total of $14,210.00

Said Exhibit 1 further indicates a credit allowance of $10,350.00 (Towards the purchase of said 980 cases of Ultra Sheen) given for the 900 dozen Sylvania Magicubes sold by D'Amato to Balzac Trading at $11.50 per dozen, which were picked up by Balzac Trading's deliveryman simultaneously with his delivery to D'Amato of the 980 cases of Ultra Sheen.

Exhibit II- Invoice prepared by defendant D'Amato (then doing business as Metro Shop Supply Company) given to the Balzac Trading deliveryman on October 17, 1971, at the time of the delivery and sale to defendant D'Amato of the 980 dozen Ultra Sheen, showing a sale to Balzac Trading of the 900 dozen Sylvania Magicubes referred to in Exhibit I.

Exhibit III-Invoice dated June 6, 1972 for the sale and delivery by defendant Jomar Distributors, Inc. to MCS Beauty Supply, of Gunhill Road, Bronx, New York, for 200 dozen Ultra Sheen at $14.50 per dozen, for a total of $2,900.00.

At the time of the delivery of said order, MCS Beauty Supply requested and received from Jomar and additional 209 dozen at the same price and paid, in full, by two separate checks for the total delivery (409 dozen).

Exhibit IV -Invoice dated June 23, 1972 for sale and delivery of 100 dozen Ultra Sheen to Thrifty Merchandise, of East 17th Street, New York City, at $14.50 per dozen, for a total of $1,450.00. This merchandise was paid for upon delivery by check.

Exhibit V -Invoice dated June 26, 1974 for 204 dozen of Ultra Sheen sold and delivered by defendant Jomar Distributors, Inc. to Interstate Cigar Corp. at South 3rd Street, New Hyde Park, New York, New York, at $14.50 per dozen, for a total of $2,958.00.

Exhibit VI -Invoice dated June 26, 1972 for 200 dozen Ultra Sheen at $14.50 per dozen, for a total of $2,900.00, sold and delivered on the same day by defendant Jomar Distributors, Inc. to L.S. Amster Co., Inc., located at Broadway, Garden City Park, New York.

Exhibit VII-Invoice dated June 30, 1972 for 161 dozen Ultra Sheen sold and delivered on or about the 5th day of June 1972 by defendant Jomar Distributors, Inc. to Jano Distributors, of Brook Avenue, Deer Park, New York, at $14.50 per dozen, for a total of $2,334.50, paid upon delivery.

12. I had considerable difficulty in selling the 980 dozen Ultra Sheen to the trade after the first of the year

(1972), and was told by my customers that the manufacturer had come out with a new jar and new packaging, and that along with the new packaging, they were featuring a special price which was less than the $15.25 per dozen that I was asking. Since I continued to get such resistance, because of the price break of which I was advised, and the new packaging, I decided to sell my supply out at cost, and actually realized no profit at all for the 980 dozen jars which I purchased from Balzac Trading pursuant to their invoice number 6424 (Exhibit I).

13. I did no further trading with either Sam Soane or Balzac Trading (which, for all intents and purposes, I understood to be one and the same) after the transactions described hereinabove. Moreover, I never met personally or even spoke on the telephone with the man described as "Sam Soane", and never again met with or spoke to his salesman (Richie). I was told, however, that their warehouse is located at Remsen Avenue and Winthrop Street in Brooklyn. I have no further knowledge of the claims asserted in the complaint. I never again dealt with a product called Ultra Sheen.

14. It is my intention to submit herewith my answer to the complaint, and while I have no objection to the Court im-

posing the temporary or permanent injunction requested by plaintiff herein, it is respectfully urged that I have made a full disclosure to the Court and to plaintiff regarding the extent of my relationship with plaintiff's product, and that this action should, in all respects, be dismissed as against my corporation, Jomar Distributors, Inc. and against me individually.

Sworn to before me this
8th day of August, 1972.

(Notary Stamp)

/s/
DENNIS D'AMATO

(Case called.)

(A jury and two alternates were duly empaneled and sworn.)

(Mr. Wilson made an opening statement on behalf of the government.)

(Mr. O'Brien made an opening statement on behalf of the defendant Robert Donovan.)

(Mr. Shargel made an opening statement on behalf of the defendant Dennis D'Amato.)

THE COURT: Call your first witness.

MR. WILSON: Ernest Reinke.

E R N E S T R E I N K E, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. Reinke, where are you from?

A Port Jefferson, Long Island.

Q What do you do for a living?

A I own an answering service.

Q What is the name of that service?

A North Shore Answering Service.

Q Do you have any other names?

A Port Jefferson, Port Echo.

Q Try to keep your voice up as loud as possible. We

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have some competition.

One name is the Port Jefferson Telephone Answering Service?

A Yes.

Q Where are you located?

A 1500 Main Street, Port Jefferson.

Q Will you tell us exactly what your company does?

A Well, answer phones for doctors, lawyers, small business people, large business people, when they are out of the office. Our secretaries take over the phones.

Q In which you answer their own private phones?

A Right. We rent phone numbers to people, they can use one or two people who will rent one phone number.

Q Did you company have a customer by the name of Zimmer & Associates?

A Yes, we did.

Q What service did you provide to Zimmer Associates?

A We provided him with a secretary -

MR. SHARGEL: Objection.

THE COURT: Overruled. This is taken subject to connection, I assume. Is that the objection?

MR. SHARGEL: No,sir.

THE COURT: Will you step up here a moment?

(At the side bar.)

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MR. SHARGEL: Judge, the basis of my objection is that he spoke of Associates without identifying the party and started to say "him" as though --

MR. WILSON: I am going to identify Mr. Donovan as the man he dealt with.

THE COURT: We will take it subject to connection.

MR. SHARGEL: Another thing, in view of the fact that there is no conspiracy charge --

THE COURT: It is a scheme and artifice, that is something else again. You can place your objection on the record, but that is the basis, it is a scheme and artifice.

MR. WILSON: That is correct.

THE COURT: It amounts to the same as a conspiracy and falls within the rules of evidence.

MR. SHARGEL: At this time I ask for a limiting instruction, if it is taken subject to connection.

(In open court.)

THE COURT: Members of the jury, at this stage of the proceedings, with the first witness on here, some testimony is coming in here which may or may not be connected up later on and we are taking some of this testimony subject to connection. As I have said, subject to being connected as related to this case.

In the event that it is not eventually connected up,

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I will ask you to disregard it and you will have to eliminate it from your minds. So we are taking it subject to connection.

Q Mr. Reinke, will you tell us what services your company rendered to Zimmer Assocaites?

A We rented Zimmer Associates a telephone number 928-4300, I believe it was.

Q What was the nature --

A Our Secretaries answered this phone for him, it rang only in our office. It was not in his office. The girl answered the phone as Zimmer Associates and took messag es and relayed the messages out again to Mr. Zimmer, who called in.

Q Was there anything that Zimmer Associates used your offices for?

A We did get mail for Zimmer Associates, letters and packages once in a while.

Q When did this service start?

A September, 1971.

Q Do you see in this courtroom this morning the man who was your customer as Zimmer Associates?

A Yes, on the end of the --

MR. O'BRIEN: Indicating the defendant Robert Donovan.

THE COURT: Very well.

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Q Mr. Reinke, I show you what has been marked as government exhibit No. 1 for identification. Can you tell us what that is?

A That is a bill that was given to Mr. Zimmer -- this is not a bill, this is a ledger sheet that we kept on Zimmer Associates. He came in and paid by cash all the time. We did not have an address to send it to. It was agreed that he would come in at the beginning of the month and pay cash.

Q That document that you have in your hand, is it made in the regular course of your business?

a Yes.

Q Is it the regular course of your business to make that card at or about the time of the entries on it?

A Yes.

THE COURT: Show it to counsel. Any objection?

MR. O'BRIEN: I object to it as immaterial.

MR. SHARGEL: May I object on the ground of relevance to my client.

THE COURT: All right. Received in evidence.

xxx (Government exhibit No. 1 for identific ation received in evidence.)

Q Mr. Reinke, there is a notation on government exhibit 1 in evidence that says, "delivered by hand". Can you tell the court and jury what that means?

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A It means that Mr. Zimmer agreed to come in at the beginning of the month and pay by cash or money order.

Q Mr. Reinke, on the reverse side of government exhibit 1 in evidence there are certain notations. Whose handwriting --

MR. O'BRIEN: I didn't notice those. May I look at those?

THE COURT: All right, surely.

MR. O'BRIEN: I do object.

THE COURT: Ask the witness about it.

Q Will you tell us in whose handwriting those notations are?

THE COURT: Could you hold it just a moment?

(Pause.)

Q Mr. Reinke, there are certain notations, handwritten on the reverse side of government exhibit one in evidence. In whose handwriting are they?

A The center one I assume is that of one of m y secretaries that wrote that.

MR. O'BRIEN: I object to the assumption.

Q Do you recognize this handwriting?

A No, I don't recognize the handwriting. It had to be --

THE COURT: Not had to be. If you don't know --

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THE WITNESS: I am sorry.

A The one on my right is m y brother's handwriting.

Q Will you tell us what that says?

MR. O'BRIEN: I object.

THE COURT: Yes, sustained.

MR. WILSON: The do cument is in evidence.

THE COURT: I am aware but I beleive that counsel only looked at the front page of the document and had not looked at the reverse side thereof.

MR. O'BRIEN: That is correct.

THE COURT: I think we had it identified for the moment. Let us not get into it.

MR. WILSON: Your Honor, I submit that is in evidence.

THE COURT: We will straighten it out at the luncheon recess.

B2 Q Mr. Reinke, directing your attention to the beginning of 1972, did the name on this account change?

A Yes, it did.

Q What did it change to?

A Donovan Associates.

Q Approximately when was the last time that any payment was made on that account?

MR. O'BRIEN: Objection, immaterial.

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THE COURT: If you look at it, I will permit that.

MR. O'BRIEN: I object to anything outside the scope of the indictment, your Honor.

THE COURT: This indictment is up to --

MR. WILSON: The date of the filing.

THE COURT:; December 4, 1973.

Q Do you recall approximately when the payments stopped on that account?

A Somewhere in the beginning of 1973.

Q After the change in name?

A Right.

Q Prior to this change ofname, approximately in November of 1972, did you meet a postal inspector by the name of George or Gene McHale?

A Yes.

Q Where did you meet him?

A He came into the office inquiring about --

MR. O'BRIEN: Objection.

THE COURT: Yes. He came into your office?

THE WITNESS: He came into my office.

Q Was he there for a couple of days?

A Yes, he was.

Q On one of those days, did Mr. Zimmer come in?

A Yes, Mr. Zimmer did come in.

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Q Will you tell us what happened?

A Mr. Zimmer walked into the offic e to pay his bill and picked up a letter that was on the deck that had been mailed to 1500 Main Street.

Mr. McHale walked out as Mr. Zimmer come in.

Q Anything said while they were all together?

A No. I said, "Good morning, Mr. Zimmer, how are you?"

He said, "Fine." He paid me the amount due, picked up the letter and left.

Q The man who walked in is the man you have identified, the man seated at the counsel table?

A Yes.

MR. WILSON: No further questions, your Honor.

THE COURT: All right.

MR. O"BRIEN: May we have a side bar?

THE COURT: Yes. Excuse us. Maybe the jury could just remain seated and we will come back. We are not doing this to keep anything from you.

(In the robing room.)

THE COURT: All right, this is for the purpose of turning over 3500 material?

MR. WILSON: Let the record reflect the government is turning over the grand jury testimony of Ernest Reinke,

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government exhibit 3501.

And some handwritten notes of an interview of Mr. Reinke, marked 3502.

That is all the 3500 material.

MR. SHARGEL: Your Honor, this has been indicated to your Honor to be a very short case. What I am suggesting is this: Can Mr. Wilson give us the rest --

THE COURT: He is not forced to do that. If you can, it will be fine.

That is something else. Let us not take it up now.

How much time do you need to look at this?

MR. O'BRIEN: I will do it as quickly as possible.

THE COURT: I will excuse the jury and have them back in. That you are entitled to do.

MR. SHARGEL: If I may.

(In open court.)

THE COURT: I thought we could avoid this but would you file out and don't discuss the case and don't talk about it at all. We will call you right back.

(Jury left the courtroom.)

THE COURT: The 3500 material has been turned over. As soon as you look at it, let me know.

Do you have another witness?

MR. WILSON: I have another witness, if I may

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check.

I have one matter with respect to government exhibit one. The notation on the back of it is a business record and like any other notation on a business record --

THE COURT: I am aware, but if I let it in, I am going to let it in.

MR. WILSON: The only question is whether that information is before the jury inthe form that it is there. I don't intend to ask any questions. I intend to call a witness who will identify what the address is. The defendant's know that it is the address of the real George Zimmer. I want to know whether or not if they don't know, they should know it.

I just want to know whether this is before the jury. I believe it is.

THE COURT: I am aware of that but I don't see the need for it right now, until I am certain it is admissible. If it is, the entire thing goes in and you don't need it through this witness. There is no question this was put on -- this is a record kept in the regular course of the company's business. He already testified to it.

MR. O'BRIEN: The front part of the record. The back part went -- I believe his brother wrote part of it and we don't know why he wrote it.

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THE COURT: I will permit you to go into the further things as to when this information was on there, whether at the beginning when this record was formed or during the course and so forth, when he first saw it; so you can get it in without having to bring probably the secretary.

MR. O'BRIEN: We don't know who he got it from.

MR. WILSON: The government offers it only for the fact that it is there.

THE COURT: All right, I am aware. I want to be certain. I think it is admissible, but you can bring this out with this witness.

Now, can you turn over the other 3500 material for the next witness?

MR. WILSON: Let the record reflect that 3503 is a memorandum of an interview of Phil Patton that is being turned over to the defendants.

THE COURT: As soon as you are ready to question this witness, letme know. We will develop whether it is the customary business practice to have entries on the reverse side? Don't offer it again until we have had the luncheon recess.

MR. WILSON: Surely, your Honor.

THE COURT: Bring the jury in.

(Jury present.)

THE COURT: Mr. Wilson.

BY MR. WILSON:

Q Mr. reinke, in the course of your normal business operations do you obtain the home address of your customers or some business address of your customers?

A Yes, we do.

Q In the normal course of your operations, do you put that address on the cash ledger card, which is government exhibit one in evidence?

A Most of them aren't cash. Mostly sent to the homes, mostof the bills are sent to the business.

Q But this particular card -- what do you call this card?

A That is a ledger card.

Q When you have a home address or another address to use, do you normally put that in the ordinary course of your business?

A We do.

Q If there are any special instructions that you receive with respect to his particular home address, do you reflect that on the cash ledger card?

A Yes, we do.

MR. WILSON: No further questions.

THE COURT: All right.

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CROSS-EXAMINATION BY MR. O'BRIEN:

Q With reference to government exhibit 1, Mr. Reinke, isn't it a fact that the customer's name and address would normally be put onthe front of the page?

A Yes.

Q There is a space there designated for this address?

A Yes.

Q Isn't that correct?

A Yes.

Q This would be your normal business practice, to put it on the front?

A Yes.

Q When this account was opened up, it was opened up as Zimmer Associates, isn't that so?

A Yes, it was.

Q It wasn't opened as George Zimmer, isn't that so?

A No.

Q Isn't it a fact you did not even know Mr. Zimmer's first name when the account was first opened up?

A No.

Q No it is not a fact or no, you didn't know?

A We didn't know.

Q So you only know the account was opened as Zimmer Associates?

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A Yes.

B3 Q Do you have other customers who do business under another name?

A Yes. many.

Q In fact, that is standard business practice, is it not, that you can -- what do the initials d/b/a stand for?

Do you know what the initials d/b/a stand for?

A No.

Q Did you ever hear the expression "doing business as"?

A Yes.

Q Isn't it a fact that it is not unusual that businesses do do business under another name?

MR. WILSON: I object to this.

A Yes.

THE COURT: It is all right.

Q Now, to your own personal knowledge, Mr. Reinke, do you know whether or not there is an actual person by the name of George Zimmer?

A I assumed that.

Q No, to your own personal knowledg e, do you know whether or not there is an actual person George Zimmer?

A No.

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Q Do you know if there where other principals in the business of Zimmer Associates?

A No.

Q You do not know?

A I do not know.

Q Do you know what business Zimmer Associates was engaged in?

A No.

Q Do you know whether or not Zimmer Associates had anything whatever to do with Ultra Sheen?

A No, I do not.

Q You testified that you received or that your secretary recieved messages for Zimmer Associates?

A Yes.

Q Do you keep those messages?

A We keep them only on file one month, time stamped when they come in and when th ey go out and kept one month.

Q On mail received, is that time stamped also?

A No.

Q You time stamp just the telephone messages?

A As they come in and when the girl gives them out to somebody that calls, she time stamps it again and puts it in the file.

Q You testified that Mr. Donovan came into your place

of business and paid you by cash, is that correct?

A I knew him as Mr. Zimmer.

Q All right, Mr. Zimmer came in and --well let's get back to that.

Did you ever ask him whether or not his name was Zimmer?

A No.

Q So all you know about is an account of Zimmer Associates?

A Yes.

Q When Mr.Zimmer came in and paid you, did he always pay you by cash?

A Yes, he did.

Q Isn't it a fact that there are occasions when he paid you by check?

A No, money orders I believe. I am not sure. Money orders it was.

Q Were you asked this question -- did you testify before the grand jury?

A No.

MR. WILSON: He did, your Honor, but quite a while ago.

A Did I?

Q In May?

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A Yes, I did.

Q May 31, 1973?

A Right, I did.

Q Were you asked this question and did you give this answer, page --

THE COURT: Incidentally, you ought to make the statement that is required that this was furnished to you --

MR. O'BRIEN: From information given by the United States Attorney.

THE COURT: Before you started your cross-examination of this witness you were furnished with these documents voluntarily by the United States Attorney as required by law.

MR. O'BRIEN: Yes, that is correct.

Q Were you asked this question and did you give this answer:

"Q Did he pay by check or cash?

"A Once in a while by check, money orders or cash."

Was that a truthful answer?

A Yes,it was.

Q Does this now refresh your recollection as to whether or not he paid by check on occasion? Is it true, or don't you really remember?

A I know it was cash. I remember money orders, the check I am not sure.

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Q But you did testify before the grand jury that he paid by check as well as money orders and cash?

A I must have.

Q When Mr. Donovan came to your business and changed or opened an account of Donovan Associates, isn't that so?

A Yes.

Q Do you have a ledger sheet in that account?

A I believe so.

MR. O'BRIEN: May I have that?

(Handed to counsel)

MR. O"BRIEN: May I have this marked as a defendant's exhibit for identification?

THE COURT: Surely.

xxxx (Defendant Donovan Exhibit A marked as an exhibit for identification.)

Q I show you defendant's exhibit A for identification and ask you if that is a ledger sheet that you kept under the name Donovan Associates?

A Yes.

Q Now, on government exhibit 1, which is the ledger for Zimmer Associates, on the front part it says "delivered by hand." You testified with regard to that.

Now, it is therefore a fact that MR. Donovan never sent, used the mails to send any payments of this account to

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you, isn't that so?

A Would you say that again?

Q When he paid the account, he came into your place of business and paid it, he did not send it through the mails, isn't that so?

A That is correct.

Q On defendant's exhibit A for identification, it says, "Don't send." Isn't that so?

A That's right.

Q Isn't it a fact that Mr. Dononvan instructed you not to send anything through the mails?

A Correct.

Q When this account was -- when the secretary answered the phone, do you recall the telephone number?

A 928-4300.

Q Right. Isn't it a fact that when the secretary answered the phone, she answered the phone "4300"?

A That is right.

Q That was the way the phone was answered?

A Yes.

Q Did anybody or any of your other clinets have that same telephone number?

A Many.

Q How many others?

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A That particular number, maybe two. He shared with two other clients.

Q In going back just a minute on payment by cash or check or money order, isn't it a fact that on those occasions when you are not in the office, your brother is in the office?

A Yes.

Q Isn't it also a fact that there are many occasions when you are not there and your brother is there?

A Yes.

Q Did Mr. Donovan ever pay your brother?

A Yes.

Q The final question on Zimmer Associates, that account was paid in full, was it not?

A Yes.

Q There is no outstanding balance?

A Never any problem.

MR. O'BRIEN: I have no further questions.

THE COURT: Mr. Shargel?

BY MR. SHARGEL:

Q Mr. Reinke, do you know Mr. D'Amato?

A No, I don't.

MR. SHARGEL: Thank you.

MR. WILSON: The government offers defendant's

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exhibit A in evidence.

MR. O'BRIEN: I don't think it is pertinent or material to this indictment, your Honor. It has nothing to do with this indictment, that is my objection. Otherwise I have no problem.

THE COURT: May I see it please?

MR. WILSON: Perhaps I ought to authenticate it. The only objection is on the grounds of relevancy?

MR. SHARGEL: I have the same objection.

THE COURT: I will receive it in evidence.

xxx (Government exhibit No. 2 received in evidence, formerally Defendant Donovan Exhibit A for identification.)

THE COURT: Anything further?

REDIRECT EXAMINATION BY MR. WILSON:

Q You were asked about Zimmer Associates being paid in full. Has Donovan Associates been paid in full?

MR. O'BREIN: Objection, your Honor.

THE COURT: Yes, sustained.

MR. WILSON: I have no further questions.

RECROSS-EXAMINATION BY MR. O'BRIEN:

Q Mr. Reinke, you testified that you used three names to conduct your telephone answering service?

A No, I said that we had several,maybe forth or fifty numbers which went out with two or three lines on each

number. Mr. Donovan or Mr. Zimmer was on with maybe one or two other clients. That is why it was answered as "4300".

B 4 Q I think you misunderstood. You said that your answering service is operated under North Shore and Port Jefferson --

A Port Echo.

Q Are they all --

A Companies that I bought out.

Q All operated at this same place?

A Yes., at 1500 Main Street.

MR. O'BRIEN: No other questions.

THE COURT: Anthing further?

You may step down.

(Witness excused.)

THE COURT: Do you have a witness now that will be a short witness?

MR. WILSON: I hope so.

THE COURT: Let's put him on the stand. I hope you won't mind. This is one instance we are going to run over a little bit, but I will make it up to you at the end of the day.

MR. WILSON: Phil Patton.

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P H I L L I P E. P A T T O N, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. Patton, where are you from?

A] Erie, Pennsylvania.

Q By whom are you employed?

A C. C. A. Sterling, Inc.

Q Is that also known as Sterling Seal Company?

A Yes, it is.

Q What is your position with them?

A President of the company.

Q Will you tell the court and the jury what the Sterling Seal Company does?

A We are manufacturers of closures, metal stampings, primarily used in the cosmetic, drug, food industries; caps used on most national products, screw caps.

MR. WILSON: May I have these two jars marked as government exhibits 3 and 4 for identification.

xxx (Government exhibit Nos. 3 and 4 marked for identification.)

MR. WILSON: And these three marked as 5, 6, and 7 for identification.

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(Government exhibits Nos. 5, 6 and 7 marked for identification.)

Q Mr. Patton, I how you jars that are marked government exhibits three through seven for identification. I ask you if you can identify the caps on them, the jar caps on them?

A Yes, I can.

Q What are they.

A These are closures we market called Unishell, which is a metal cap and we are the only manufacturers of this type of cap.

Q Mr. Patton, have you prior to coming on the stand this morning, ex amined the jars that are in the three boxes that have ben marked government exhibits 8, 9 and 10 for identification?

A Yes. I have.

Q Are these the same as the caps in front of you?

A The same caps, yes, theyare.

(Government exhibits Nos. 8, 9 and 10 marked for identification.)

Q Do you also sell caps to Johnson Products, Inc.?

A Yes, we do.

MR. WILSON: May these be marked as government exhibits 11 and 12 for identification.

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xxx (Government exhibits Nos. 11 and 12 marked for identification.)

Q Mr. Patton, I show you government exhibit No. 11 for identification. Can you identify what that is?

Yes, sir. This is a copy of what we call a bill of lading which is used to identify the trucker who picked up the merchandise from us, singed for it, and taken on its way.

Q Is that a document made in the regular course of business of Sterling Seal Company?

A Yes, it is.

Q Is it the regular course of business of Sterling Seal Company to make that document at or about the time reflected on it?

A Yes, it is made that day.

MR. WILSON: The government offers 11 for identification.

MR. O'B RIEN: I object to it. I would state the reasons for my objections later.

T HE COURT: Let me see i[illegible]lease.

(Handed to court.)

THE COURT: I think I can see the basis for the objection on the face of it. Subject to connection.

MR. WILSON: The government offers it as a

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business record, relevant to the proceedings herein.

THE COURT: I understand.

MR. SHARGEL: Note my objection on the grounds of relevancy.

MR. WILSON: It is a business record.

THE COURT: I understand it is a business record, but it is taken -- would you step to the side bar, please?

(At the side bar.)

THE COURT: I assume the objection is there is no connection between Zimmer Assocaites.

MR. O'BRIEN: And I also question its relevancy. This does not lay venue in this district.

T HE COURT: I am not concerned about that.

MR. WILSON: Let me make it perfectly clear. We have already identified that the defendant Donovan is Zimmer Associates. This document on the face of it contains the name Zimmer Associates and also contains a telephone number rented by Zimmer Associates. The government is offering this as a business record for the truth of the matters contained on it and because of the obvious relevance to the defendant Donovan.

THE COURT: I didn't notice that at the bottom.

MR. O"BRIEN: I didn't either.

THE COURT: It is admitted.

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MR. WILSON: And the same thing with the second shipment.

THE COURT: All right.

MR. SHARGEL: Same objection.

(In open court.)

(Government exhibits 11 and 12 for identification received in evidence.)

xxx

Q Mr. Patton, would you tell the jury what was being shipped in government exhibit 11?

A This was 19 cases of Unishell caps which were white with a vinyl liner, which is a paper disc inside the cap and 4 cases with a number and a case --

Q Shipped to where?

A These were shipped to Zimmer Associates, care of Hamilton Motor Lines, and the name of the driver.

Q Any phone number given for Hamilton?

A Yes, I have. To my knowledge --

Q The last line of the document.

A I am sorry. Yes,"call the trucker for delivery instructions."

Q What number were you given?

A The area code is 516, 928-4300.

Q I show you government 12 for identification. Is that the same as government exhibit 11, except that that is

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a later date?

A A later date and a different quantity.

Q How many involved in government 12?

A 24 cases of 650 caps per case, 10600, 83 millimeter Unishell caps.

Q Is that made in the regular course of business of the Sterling Seal Company?

A Yes.

Q Is it the regular course of business of Sterling Seal Company to make this document?

A Every shipment we make.

MR. WILSON: The government offers it in evidence.

MR. O'BRIEN: I object.

MR. SHARGEL: Same objection.

THE COURT: Same ruling, received in evidence.

MR. WILSON: Will you mark these as government exhibits 13, 14 and 15.

(Government exhibits Nos. 13, 14 and 15 marked for identification.

Q Mr. Patton, I show you government exhibit No. 13 for identification and I ask you if you can identify that?

A Yes, I can.

Q What is it?

A This is a purchase order from Zimmer Assochtes.

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their number 1858 that was sent to us to purchase our Unishell caps.

Q Did this document come from your files?

A Yes, it did.

MR. WILSON: The government offers it in evidence.

THE COURT: Show it to counsel.

MR. O'BRIEN: Same objection.

THE COURT: Show 13, 14 and 15 at the same time. Maybe we can save a moment or two.

MR. WILSON: Yes, your Honor.

MR. O'BRIEN: I object to them.

THE COURT: Let me see them.

(Handed to court.)

THE COURT: They are received in evidence.

(Government exhibits Nos. 13, 14 and 15 for identification received in evidence.)

Q Mr. Patton, government exhibit 13 is a purchase order that corresponds to this first billing you were shown, is that right?

A No, this does not. This is a purchase order that came in for 89 milimeter caps.

Q Therefore, before you shipped the 89 milimeter did you recieve government exhbit 14?

A Yes, sir, we did.

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Q This was a confirmation of a phone call to chang e the purchase order from 89 milimeter caps to 83 milimeter caps, which was shipped on this bill of lading, the first bill of lading?

A Yes, this is.

Q For what quantity?

A For 12,000.

Q Is government exhibit 13 thepurchase order for the 15 and a half thousand caps shipped as part of that second bill of lading that you have identified?

A Yes, it is.

Q Is it possible, Mr. Patton, for anybody in America to buy your caps?

A Yes, it is.

MR. WILSON: No further questions.

THE COURT: Mr. O'BRIEN?

MR. O'BRIEN: I will be a litde while with this witness.

THE COURT: How long?

MR. OBRIEN: A half hour.

THE COURT: All right, members of the jury, it is ten minutes after one now and I know how hard and how difficult it is to get lunch around here. Get back as promptly as you can, and about a quarter after two, as promptly as you

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can.

Don't discuss the case with anybody and don't let anybody discuss it with you, and don't make up your minds about it.

When you come back, report back into the juryroom as close to a quarter after two as you can.

I Would appreciate counsel not going into the corridors until the jury has left and with our elevators it might be a little while.

(Luncheon recess taken until 2:15 p.m.)

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AFTERNOON SESSION

2:15 p.m.

PHILLIP PATTON, resumed.

(Jury present.)

THE COURT: Proceed.

CROSS-EXAMINATION BY MR. O'BRIEN

Q I show you government exhibits 4 and 5. I ask you if that cap is an 83 milimeter cap?

A Yes, it is.

Q The other cap m anufacturers also manufacture an 83 milimeter cap?

A Of this type?

Q No, an 83 milimeter cap.

A Yes, other 83 milimeter caps are made.

Q Would those other 83 milimeter caps fit this bottle?

A Yes, they would.

Q Now,looking at that cap, as to either one of the exhibits, 4 or 5, without taking the cap off, looking at the top of that cap, could you tell us that you can identify that cap as being made by your company?

A Yes, I can.

Q Would yu show me how you can do that?

A We are the only ones that make an 83 milimeter metal

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smooth side and you can see by looking at the cap this doesn't have the visible lugs on the side, a lug cap, which is not a continuous thread cap.

Q How can you tell it is a continuous thread?

A By looking at the cap, there would be projections here, the metal would be ruled visibly from the outside.

Q All right. Now, anybody can purchase that cap from your company?

A Yes, they can.

Q How many caps would you sayyour company, 83 millimeter caps similar to this, does your company sell in one year?

A White ones you mean or for all colors?

Q First for all colors.

A May be three million.

Q And whie ones?

A Three or four hundred thousand.

Q Mr. Patton, do youknow Mr. Robert Donovan?

A No, I don't.

Q Do you know Mr. D'Amato?

A No, I don't.

Q Do you know who sent this purchase order to you? I refer to government exhibit 13.

A As far as I know, it was Zimmer & Associates.

Q Do you have an y personal knowledge as to who

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actually sent that to you?

A No, I don't.

Q Have you ever seen that signature before?

A Yes, I have.

Q Do you know who wrote that?

A No, I don't.

Q I show you government exhibit number 15. Do you know who wrote that name?

A No.

Q By that name I am referring to George Zimmer?

A I would assume George Zimmer.

Q But you don't know who wrote it?

A No.

Q You don't know who sent you this exhibit. Again, government exhibit 14, do you know who sent that to you?

A I don't know the person.

Q You don't know who wrote that signature?

A No.

Q On government exhibits 11 and 12, which appears to be -- tell me what are these?

A Bills of lading made out by us.

Q Your company made it?

A Yes, and the trucker signs it when he picks up the caps.

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Q Were these bills signed?

A Yes, they were.

Q What does this signature read?

A Jones Transit, I believe, the date and the set of initials.

Q Do you know who wrote this?

A To the trucker, that is his name, Jones is the truck line and that is the driver's name and the initials after that, SH, would b e our shipping foreman who initials it.

Q When Zimmer Associates ordered 83 milimeter caps --

A Originally they ordered 89 and changed to 83.

Q How many 83 milimeter caps did they order?

A There were two orders, approximately 27,550.

Q That was for what year?

A For 1971 and 1972.

Q During these years you would have sold approximately three or four hundred thousand of these caps during that one year?

A Yes.

Q And the same during the following year?

A Yes.

Q Did Zimmer and Associates ever order any other caps from you?

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A Yes.

Q What type of caps were they?

A They ordered 100 milimeter seals.

Q But the 100 milimeter is a larger cap?

A A little larger.

Q Would a 100 milimeter cap fit on those bottle?

A No, they wouldn't.

Q Do you know what Zimmer Associates used those 100 milimeter caps for?

A No, I do not.

Q Do you know what they used the 83 milimeter caps for?

A No, no idea.

Q Was there any other correspondence between Sterling Seal and Zimmer Associates?

A I believe there was some correspondence, whether in response to phone calls, peolle within my company sent samples of various caps which preceded the actual purchase.

Q In any of your correspondence, did Zimmer Associates ever indicate what they were purchasing those caps for ?

A No.

MR. O'BRIEN: Before the luncheon recess I did indicate that it would take a half hour --

THE OCURT: Have you finished?

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MR. O'BRIEN: Yes.

MR. SHARGEL: No questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: Next witness.

MR. WILSON: Mr. Hussey.

E D W A R D N. H U S S E Y, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. Hussey, where are you from?

A Carr-Lowery Glass Company.

Q Where are your offices?

A 415 Madison Avenue.

Q Here in Manhattan?

A New York City.

Q What is your position with Carr-Lowery Glass Company?

A I am a salesman.

Q How long have you been a salesman?

A Four and a half years.

Q What is Carr-Lowery?

A They manufacture bottles and jars.

Q Did you ever hear of a firm called Zimmer and

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Associates?

A Yes.

Q You never met with anyone from that company, did you?

A No.

Q Directing your attention to January 17, 1972, did you have any contact with that firm, Zimmer and Associates?

MR. SHARGEL: I object to that on behalf of my client, your Honor.

MR. O'BRIEN: I object on behalf of Mr. Donovan.

THE COURT: Overruled.

A Yes, I had a telephone conversation.

B 6 Q With whom?

A Mr. George Zimmer.

MR. O'BRIEN: Objection to anything said unless we can identify the person who was calling.

THE COURT: All right, sustained for the moment. Proceed.

Q You had a conversation, a telephone conversation with a man named George Zimmer on January 17, 1972, is that right?

MR. O'BRIEN: I object to the form.

THE COURT: I will permit just that.

A That is right.

Q Is that right?

A Yes.

Q On the following day, January 18, 1972, did you write a letter to Zimmer Associates?

MR. SHARGEL: Objection.

A Yes, I did.

Q When there is an objection, Mr. Hussey, don't say a word.

THE COURT: I will permit that.

MR. WILSON: May I have this marked as government exhibit 16 for identification.

(Government exhibit No. 16 marked as an exhibit for identification.)

Q Mr. Hussey, I show you government exhibit 16 for identification and ask you if you can identify it?

A Yes, I can.

Q What is it?

A This is a copy of my letter to Zimmer and Associates.

Q What did you do with this letter, the original of that letter?

A The original was mailed to the customer.

Q Is that your file copy of the letter?

A Yes.

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MR. WILSON: The government offers 16 for identification.

THE COURT: Show it to counsel.

MR. SHARGEL: I object on the grounds previously set forth.

MR. O'BRIEN: I also object.

THE COURT: Let me see it.

Mr. Hussey, is that a copy of a letter which you mailed for dicated yourself?

THE WITNESS: Thatis right, dictated to my secretary.

T HE COURT: All right, received in evidence.

xxx (Government exhibit 16 for identification received in evidence.)

MR. WILSON: Your Honor, may I read this to the jury?

THE COURT: Yes, you may.

(Government exhibit 16 read.)

Q What is your first name?

A Edward.

MR. WILSON: May I have this renumbered as government exhibit 18 for identification.

xx (Governmet exhibit No. 18 marked as an exhibit for identification.)

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Q Mr. Hussey, I show you government exhibit 18 for identification and ask you to tell us what that is?

A This is an order received from Zimmer Associates for 28, 800 pieces of our number 250 8-ounce flint jars.

Q How did you receive this letter?

A By the mail, it has our stamp of receipt on February 22.

Q Does your handwriting appear on government exhibit 18?

A Yes, it does, in the upper left-hand corner my initials, EH.

MR. WILSON: The government offers it into evidence.

MR. O'BRIEN: I object to it.

THE COURT: Overruled.

MR. SHARGEL: Note my objection again and I would ask for a limiting instruction as to all these documents.

THE COURT: No, overruled, and that is received in evidence.

xxx (Government exhibit No. 18 for identification received in evidence.)

MR. WILSON: May I read this to the jury?

THE COURT: Yes.

(Government exhibit No. 18 read.)

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Q Mr. Hussey, government exhbit 18 in evidence has some handwriting which says, "with or without locking notch, prefer without locking notch."

Is that in your handwriting?

A Yes.

Q Will you tell us why it is there?

MR. O"BRIEN: Objection.

THE COURT: Sustained.

Q Did y ou have any conversation with respect to that notation?

A Yes.

Q With whom did you have that conversation?

A A person who purported to be Mr. Zimmer.

Q What did he say to you?

MR. O'BRIEN: Objection, and move to strike.

THE COURT: Yes, go back a little bit more, please.

THE WITNESS: With whom did I have this conversation?

Q Right.

A Mr. Zimmer.

Q A guy called you and said he was Mr. Zimmer?

A Yes.

Q What did you talk about with respect to this notation?

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MR. O'BRIEN: I object.

THE COURT: Overruled.

A Whether or not he could have it without the locating ring. I informed him because this order was so --

Q Louder.

A This situation, this appears to be about a year ago and I can't recall in detail exactly what happened.

But to the best of my recollection, we make this No. 250 8-ounce flint jar without or with a locating ring. Mr. Zimmer --

MR. O'BRIEN: I object to this on behalf of my client.

A I could not assure him he could get it that way. He would just have to take whatever we have in stock or whatever we were making at the time.

Q Mr. Hussey, let me show you government exhibit 5. I ask you does that jar have a locating notch?

A Yes, it does.

Q Let me show you exhibits 3 and 4 and ask you do these jars have locating notches?

A This does not. This one does.

No. 3 does not, number 4 does not.

Q What about 5, 6 and 7, do they have it or not?

A Number 7 has it, number 8 has it.

Q Mr. Hussey, can you personally tell by looking at that jar whether that jar was manufactured by your company?

MR. SHARGEL: I object to the form as leading.

THE COURT: I will permit it.

Q Can you personally tell that?

A No.

Q Were the 28,000 jars shipped to Zimmer and Associates?

A Were they shipped?

Q Were they?

A Yes.

Q What freight line was used?

A Atkinson Freight Line.

MR. WILSON: I have no further questions.

THE COURT: Mr. O'BRIEN?

MR. O'BRIEN: May we have the 3500 material?

THE COURT: Yes, all right.

Members of the jury, I will ask you to file out and have a five minute recess.

(Jury left the courtroom.)

THE COURT: You know, there is no requirement that you give it before finishing your direct, but if you can it would move this case along.

MR. WILSON: I agree with the court.

THE COURT: I just don't understand why you didn't give all the 3500 material you could. There is absolutely nothing in this kind of --

MR. WILSON: I agree with the court. I was caught a little by surprise.

THE COURT: How much more can you give for the balance of your witnesses? I am not requiring you to do so, because there is no requirement that you do it. But if you are goh g to have a recess every time we get 3500 material for a witness, it takes a ten-minute recess and you can see what we are in for.

I am not finding fault. I am not forcing you to turn over any 3500 material.

MR. SHARGEL: May I, judge, make a record on this incident? I am terribly disturbed by the manner in which the 3500 material is being turned over and your Honor made certain observations but I would like to put my objection --

THE COURT: Your position is on the record. This is the proper way to do it and it has to be during a recess and you have gotten it and there is nothing wrong with that.

MR. SHARGEL: It appears to me, and I may be wrong, but it appears to me that each of these five-minute recesses are caused by the defendants.

THE COURT: No, it isn't. It doesn't indicate that

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at all.

MR. WILSON: I am turning over 3504, a set of notes by Postal Inspector McHale of a conversation with Mr. Hussey and another man.

And 3504A, notes by Inspector Boyle, of a conversation with Mr. Hussey and another man.

These aren't really 3500 material but I am giving it to them out of an excess of caution.

He did not testify before the grand jury.

THE COURT: Do you plan to t-rn over any further 3500 material or wait until the witness has testified?

MR. WILSON: I would prefer to wait, your Honor.

MR. SHARGEL: May I suggest a procedure then?

THE COURT: The procedure is going to be what the law requires. You can ask for a recess, that is what the law says. The defense makes a request for a recess and rather than your making a request, I will then after the witness finishes on direct say, "All right, members of the jury, we will hwe a short recess."

MR. SHARGEL: Very well, your Honor. May I make one request? Will y our Honor consider telling the jury when they come back on this occasion, because you can see the problem of delay, that this is in an orderly fashion and not attributable to the defendants?

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THE COURT: All right.

MR. SHARGEL: Thank you.

B7 MR. WILSON: At the start of the next witness' testimony I will simply hand behind me the 3500 material.

THE COURT: We won't do it that way.

MR. WILSON: I don't want to go ahead and do it ahead of time for a reason I can't tell at this time.

THE COURT: You can do it in the regular way. There is nothing wrong with the regular way.

MR. WILSON: I just assumed from what Mr. O'Brien commented at the end of the morning that he would spend a long time with each of the government witnesses and it now appears I am wrong. But that had something to do with how fast we hav e the jury filing in and out.

THE COURT: I am not upset about it. Maybe I sound a little bit as though I am irritated and I really am not. I am not trying the case, it just seems a lot of the 3500 material could be turned over before the trial started, but I am not trying it, y ou are, Mr. Wilson.

(Jury present.)

THE COURT: Members of the jury, it is not anybody's fault at all that you have to file in and out. We have certain procedures to follow and the court is required to declare a recess at certain times for c ertain procedures and

the responsibility for it falls neither on the government nor the defendants.

If you want to blame anybody for it, blame me.

All right, is that satisfactory, gentlemen?

MR. SHARGEL: Thank you, judge.

T HE COURT: Proceed.

CROSS-EXAMINATION BY MR. O'BRIEN:

Q Mr. Hussey, before you sent that letter, you said you received a call from a man who identified himself as Zimmer?

A Yes.

Q The man who identified himself as Zimmer at that time on the telephone, is it not a fact that he placed an order on the telephone?

A It is very possible.

Q Did he ask y ou for some samples to be sent?

A Do you mean going back to m y letter of January 17?

Q No, I am talking about prior to your letter of January 18, I believe it was. You said you received a telephone call, correct?

A Yes.

Q My questions are directed at that telephone call.

A The day preceding my letter.

Q Yes, if that is when you received the telephone

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call.

A Actually, there was a prior conversation to that where it initially started and we sent some samples.

Q But I am talking about on January 17.

A Yes.

Q You received a telephone call and at that time was an order placed by Mr. Zimmer?

A No.

Q Did Mr. Zimmer ask you to send some samples?

A Yes.

Q That was in the telephone call preceding your letter?

A That is right.

Q Now, Mr. Zimmer never asked you to send him a letter, did he?

A No, he did not, but that is just a matter of practice.

Q In fact, did you tell Mr. Zimmer that you were going to send him a letter?

A No.

Q You have a showroom in your office in Manhattan, do you not?

A Yes.

Q Carr-Lowery has other offices throughout the

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country, has itnot?

A Yes.

Q But here is an office at 415 Madison Avenue, New York?

A That is right.

Q You have a showroom at that office?

A Yes.

Q Do salesmen come up to thatoffice?

A Salesman?

Q Well, salesmen or prospective purchasers?

A Buyers, possible buyers, yes.

Q At that time has there been an occasion where orders were submitted, purchase orders giben to you at the showroom?

A I would say no.

Q Never been a time where a purchase order was given to you at the showroom?

A No.

Q When a buyer comes up,has a buyer ever purchased anything from you at that showroom?

MR. WILSON: I object to this line.

THE COURT: Sustained. You don't have to answer that.

Q You never met Mr. Zimmer, isn't that so?

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A Correct.

Q Did you ever do any business with USI?

A Did I personally? No.

Q Carr-Lowery ever do business with USI?

A I really couldn't say.

Q Do you know what USI is?

A United States Industries.

Q And National Distillers, is that the complete name? USI stands for United States Industries and the full name is National Distillers, is it not?

A Yes.

Q Have you ever met anybody at National Distillers? You nod your head but you have to speak up.

A Right. Do I know anybody at National Distillers?

Q Correct, or met anyone?

A No.

Q Did you ever meet Robert Donovan, this gentleman to my right?

A No, I dont recall.

Q This jar here, I refer to government exhibit 7, and referring to the bottom of that jar, I will ask you what that is?

A That is what we call a locating -- locator rail.

Q How many bottles do you produce with a locating

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rail?

A I could not say.

Q Would it be in the millions?

A Of all the jars we make?

MR. WILSON: Objection, he said he couldn't say.

A You are asking me a manufacturing question. I am a salesman. I just know what my customers use.

MR.WILSON: We will have a witness from the manufacturer, your Honor.

Q You are a salesman. How many jars were sold with a locating notch on it?

A To be honest with you, I don't recall selling very many jars with or without locating rings. Most of my sales are bottles, cosmetic bottles.

Q Would it be fair to say that Carr-Lowery produces millions of jars?

A Yes, that would be correct.

Q You don't know whether or not government exhibit 7 was produced by Carr-Lowery?

A That is correct.

Q When Mr. Zimmer spoke with you on the telephone, did he ever indicate what he wanted those jars for?

A To the best of my knowledge, no.

Q He did say that he wanted them for a customer of

his, did he not?

A Yes.

Q He did say that in the telephone conversation wich preceded your letter?

A Yes.

Q At that time -- what is the size of this jar? Do you know?

A Yes, eight ounces, No. 250, 8-ounce stock jar.

Q In the telephone conversation, did MR. Zimmer limit his conversation just to the No. 250 jars?

A What conversation?

Q The conversation which immediately preceded your letter?

THE COURT: January 17.

A I am going back to the best of my recollection. To the best of my recollection we discussed the many jars, because I mentioned in that letter not only the 250, but the 447 and the 500 and 600. So I just recall he wasn't interested in opal samples, he wasn't interested in that. He was interested in a round jar and I sent him some of our stock samples and those are the ones.

Q What sizes were the other jars?

A All 8-ounce flint jars.

Q How about the 447?

A They are alos an 8-ounce jar, all 8-ounc e, all the same size.

Q How many other people, let us take first of all in the New York area, use that same size jar?

A Of my customers, and I am only speaking of my customers, off-hand I would say none.

Q Other than your customers -- have long have you been in the glass industry?

A About four and a half years, five years.

Q And those five years, that period of time, have you learned that other people use those types of jars?

A Yes. I am not saying other customers don't use them. Yes.

Q Could you give us an approximation of how many people use those size jars, just in the New York area?

A No.

MR. O'BRIEN: I have no further questions.

B 8 BY MR. SHARGEL:

Q MR. Hussey, do you know a Dennis D'Amato?

A No.

Q Did you ever receive letters from Dennis D'Amato?

A No.

Q Or correspondence?

A No. I don't know him.

MR. SHARGEL: You don't know him? I have no further questions.

THE COURT: Any redirect examination?

MR. WILSON: Yes, your Honor.

REDIRECT EXAMINATION BY MR. WILSON:

Q You were asked a moment ago do other people use this type of jar. By this type of jar do you mean the eight ounce jar?

A Yes. Specifically that jar there.

Q Do you know whether anyone else in the New York City area uses your 250 model, 8-ounce jar, to your own knowledge? Do you know?

A It is a very small item with us. I think I might have one customer, on second thought, who may use the 250 jar.

Q You indicated in response to Mr. O'Brien's question that you had sent Mr. Zimmer some samples prior to having the conversation with Mr. Zimmer on January 17, is that right?

A Yes.

Q You said they were opal samples?

A Right.

Q What are those?

A Opal is white, similar in size, only white Opaline type glass.

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Q A. solid white color?

A Solid white.

MR. WILSON: I have no further questions.

RECROSS-EXAMINATION BY MR. O'BRIEN:

Q How many salesmen does Carr-Lowery employ?

A I would say about 7 in the New York office. We have an office in Cincinnati, 2; in Chicago 2 and one on the West Coast.

Q How many other manufacturers are there of those type jars?

MR. WILSON: Objection to those type.

THE COURT: Yes. Let's specify which exhibit.

Q I show you government exhibit No. 7 and ask you how many other manufacturers produce that type of a jar?

A To the best of my knowledge, I would say Owen-Illinois would make this; Brockway Glass could make this; Whetson Glass could make it; I thin Oil City could make this. Maybe two or three other manufacturers.

Q Are you familiar with a company by the name of Lehn and Fink?

A Yes.

Q Do you sell Lehn and Fink these type jars, referring to exhibit 7?

A I don't handle that account. It is in New Jersey,

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it is not in my territory. My territory is Long Island, Connecticutt and some of New York City.

MR. O'BRIEN: No other questions.

THE COURT: All right,you may step down.

(Witness excused.)

MR. WILSON: The government calls James Bausch.

J A M E S B A U S C H, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. Bausch, who do you work for?

A Atkinson Freight Lines.

Q What do you do for them?

A I am a truck driver.

Q Let me take y ou back to March 3, 1972. Did you make any deliveries on that day?

A Yes.

Q What were you delivering that day?

A Empty bottles.

Q Who was the shipper of those empty bottles?

A Carr-Lowery Glass Company.

Q Where were you supposed to ship them to or bring them to?

A To Engel's Trucking Company, Brooklyn, New York.

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Q Where did you pick up the jars that day?

A From a terminal in Jersey City.

Q Did you go to Engels?

A Yes.

Q What happened there?

A I notified the people that I was there to make the delivery and they gave me a bay to back into, which I did. They just told me to take it easy for a few minutes, they would be with me in a few minutes.

So I was sitting in the truck while I was waiting.

MR. SHARGEL: I object to all this description. No one is identified.

THE COURT: Overruled.

Q Then what happened?

A While I was backed into the platform a fellow came over and asked me if I would be willing to make a few dollars to take the freight to another place.

MR. SHARGEL: I object tc this, judge.

THE COURT: I will take it subject to connection.

MR. WILSON: I will connect it, your Honor.

THE COURT: When I say subject to connection, I think you understand if this testimony is not connected up in some way material to this case, then it will be stricken and you will disregard it.

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Q Tell us about this.

A I am. To deliver the freight to another address.

Q Did he tell you what that way?

A He said it was out in Flatbush, in Brooklyn.

Q Do you see that man in court today who you saw then?

A That man in the blue suit (indicating).

MR. WILSON: May the record reflect that the witness identified the defendant Mr. Donovan.

THE COURT: Is that so?

MR. O'BRIEN: Yes, he did point to him.

Q Will you tell us what happened then?

A I asked himwhere the place was. He said just follow me. He was driving a U-Haul-It truck.

Q Did you have any conversation with him back at Engels Trucking other than what you hve told us? Did he tell you why he needed you to follow him?

A Well, something to the effect that the freight was too big and heavy and the amount of pieces plus the weight thathe truck couldn't carry it. I have a tractor-trailer and I would be able to deliver it right to the other place.

He offered me $20 t do this favor.

Q Just tell us what you did from there.

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A So I asked him how far it was. He said, "Just follow me."

He went out Flatbush Avenue and it happened to be raining pretty hard that day so he got quite a ways out on Flatbush Avenue, made a light, and a turn, and I lost him.

So then I pulled up a couple of blocks and parked on the side. I didn't know where he went.

So he came back to me and he said, "What happened to you?" I said, "I don't know, what happened to you, where did you go?"

He says, "Well, the place is nearby here, just down the street a ways."

So we went down the street and I recognized it as a place I had been to before with freight, on Foster Avenue, in Broddyn.

Q Ideal Decorating Company?

A Yes, sir.

Q What happened at the Ideal Decorating Company?

A I back in and put about two or three fellows working on the truck with me to unload it, and we unloaded it.

Q How long did you spend unbading?

A About two hours.

MR. WILSON: May I have this marked as the next exhibit number.

xxx (Government exhibit No. 19 marked as an exhibit for identification.)

Q I show you government exhibit No. 19 for identification. Can you identify that, Mr. Bausch?

A It is the bill from Atkinson Freight Lines for the freight to be delivered at the Engle Trucking Company.

Q Is that a document you had that day with you?

A Yes,sir.

Q There is some handwriting on that document. Is that your handwriting?

A Yes, sir.

MR. WILSON: The government offers it in evidence.

THE COURT: Show it to counsel.

MR. SHARGEL: My objection is on the grounds previously set forth.

MR. O'BRIEN: I object on the same grounds; also some notations on the back. I don't know when they were put on and I object to those.

MR. WILSON: I don't know what they are either. I would not offer these notations.

THE COURT: You are only offering the face at this time?

MR.WILSON: Yes.

THE COURT: Received in evidence. In some way or

other before the jury sees it you will block it out.

xx (Government exhibit 19 for identification received in evidence.)

Q Mr. Bausch, this document says, "Zimmer & Associates care of Jones Motors, 969," and Jones Motor is crossed out, is that right?

A That is right.

Q Who did the crossing out on that document?

A A Me.

Q What did you write in its place?

A "Care of Engels Trucking Company."

Q When did you learn you were to deliver to Engels and not Jones?

A Inthe morning when I was going to pull out with the freight, with the truck to make the delivery, my company advised me that it wasn't to go to JOnes, it was to go to Engel.

MR. WILSON: No furhter questions.

MR. O'BRIEN: May we have a side bar?

THE COURT: Yes.

(At the side bar.)

MR. O'BRIEN: I just found out for the firsttime that certain photographs were shown to this witness, and had I known this before I would have made a motion. I make that

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motion at this time to see the copies of the photographs that were shown to him and whether ornot they were made under suggesting circumstances or the agents said anything.

THE COURT: Do you have the pictures here?

MR. WILSON: I have the pictures, your Honor.

THE COURT: We will take a recess.

(In open court.)

THE COURT: We will take a recess, and I ask you when you take your recess don't discuss the case and we will be a few moments.

(Jury left the courtroom.)

VOIR DIRE EXAMINATION BY MR. O'BRIEN:

Q Mr. Bausch, could you tell us the date on which you made this delivery and met this individual who you have described as Mr. Donovan?

A March 3, 1972.

Q Is there any reason why you remember that particular date?

A Yes, I seen the freight bill.

Q Definitely on that date, though, March 3rd?

A It was in March.

Q Well, I would like to get down exactly whatever it was; on that date?

A Yes, yes.

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Q Now, thereafter you were interviewed by postal inspectors, is that not so?

A That is right.

Q Could you tell us what date you were interviewed?

A No, I couldn't tell you the date.

THE COURT: Approximately?

THE WITNESS: Approximately about three months later.

Q You say approximately a few months later, did you?

A About three months later.

Q Could ithave been November of 1972?

A The first time I met the postal inspectors, it couldhave been, it was a cold day. Maybe it was in November.

Q How many times in all were you interviewed by postal inspectors?

A About three times.

Q When were you first shown any photographs of any individuals?

A When?

Q Yes.

A The first time I met them and then the second time.

Q The first time you met them, were you shown photographs?

A No, sir, the second time.

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Q Would that second time have been January 10, 1973?

A Yes, sir. A couple of months after that.

Q So approximately ten months after youhad made these observations, you were shown certain photographs by the postal inspectors?

A That is right.

Q How long did you have this man you identified as Robert Donovan under observation, during that day that you saw him?

A I spoke to him a few minutes when he asked me about going to this other place with the bottles, with the glass; spoke to him a few minutes.

Then when I lost him.

Q Howmany minutes do you mean?

A Three or four minutes.

Q What was said during that period of time?

A About delivering to some other place, and he would give me $20 for it, and just to follow him.

Q At the time that you spoke to the man you described as Mr. Donovan, did you ask him for any identification?

A No, sir.

Q]Did you copy down his license plate number?

A No, sir.

Q Did you copy down hi slicense number that would

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appear on the delivering license?

A No.

Q Did anybody at your company, to your knowledge, ever do that?

A No, sir.

THE COURT: The photographic identification, that is what led us to this. Will you get to that?

MR. O'BRIEN: Yes, I will.

Q Where were you when you were shown these photographs?

A In my house.

Q How many agents came?

A One.

Q What did he say to you at that time?

A That he was going to show me some photos and he asked me if I would recognize anybody.

Q Did he tell you what the photographs were of?

A No.

Q Did he tell you -- did you talk about the person that you had delivered certain merchandise for and did he tell you he was going to show you pictures of one they suspected had been this person?

A No,sir.

Q How many pictures didhe show you?

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A ABout ten.

Q Ishow these pictures which I ask be collectively be marked as Defendant's exhibit B.

THE COURT: Yes.

xxx (Defendant Donovan Exhibit B marked for identification.)

Q I show you those pictures and ask you were they the pictures which he showed you?

A Yes, they appear to be them.

Q You will note that there are two pictures of the defendant Robert Donovan, is that correct?

A That is right.

Q There are not any duplicate pictures of any other individual in that group, is there?

A I don't believe so.

Q On one of the pictures of Robert Donovan there is a moustache and sideburns drawn in, is that so? Who drew that in?

A I don't know.

Q Were they drawn in at the time the picture was shown to you?

A Yes.

Q Were these pictures shown to you again prior to your testifying here today?

A Yes.

Q When were they shown to you?

A In the United States Attorney's office.

THE COURT: How long ago was that, this morning, last week, or when?

THE WITNESS: Ithink it was last April.

Q I show you these two photographs and ask you -- I will give you the whole bunch of pictures and ask you which photographs you picked out.

A I picked out these two photographs.

Q Did you pick out this photograph?

A No, I picked out this one.

MR. WILSON: The one with the sideburns which contains on the back of it "AMG" with a date.

THE COURT: The other is a photogaph of Mr. Donovan?

MR. WILSON: Thatis correct.

MR. O'BRIEN: Both are photographs, one with a moustache and a sideburn, front and side view.

b 10 THE COURT: But each one has two views of Mr. Donovan, one a side view and one a full face.

MR. O'BRIEN: That is correct.

Just for completeness, will you stipulate for purposes here that this is Mr. Donovan's brother?

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MR. WILSON: I didn't bring this out.

MR. O'BRIEN: I said I did.

MR. WILSON: I will stipulate the two pictures, yes, one shows a picture, it has initials "JB" a date on the reverse side and theother one does nothave any initial on the reverse side, but is a picture of Mr. Donovan's brother.

BY MR. O'BRIEN:

Q Did you testify, sir, you picked out both of these photographs and you gave them to the postal inspector?

A When I looked at these pictures up at my apartment I picked out those pictures and said, "These look very much alike." "They look like the poeple that I seen at that date."

Q I show you this photograph --

THE COURT: We don't have a thing here as to which one.

MR. O'BRIEN: On the backof it the name appears, John Maloney".

THE COURT: All right.

Q I show you the picture of John Maloney. I ask you to study that photograph and ask if that individual resembles the man that you spoke with on that date or the day in question.

A I don't think so.

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Q But these two men do resemble the man that you spoke with?

A Yes.

MR. O'BRIEN: I have no other questions onthis hearing. I feel --

THE COURT: You have anything further, MR. Wilson?

MR. WILSON: I don't think so, your Honor, no.

THE COURT: I just will ask a question or two.

You say that you saw the individual there at Engels Trucking Company for three or four minutes, correct?

THE WITNESS: Yes, sir.

EXAMINATION BY THE COURT:

Q Then you say you got lost or one of you got lost?

A Yes, sir.

Q He eventually came back?

A Yes, sir.

Q How long did you see him on that occasion?

A We spoke about a couple of minutes when he was asking what happened to me and I said, "What happened to you?"

Q A couple of minutes then?

A Yes, sir.

Q Then you went to the other place where you eventually unloaded?

A Yes, sir.

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Q Did you see him there?

A I don't recall seeing him there.

Q Ideal Decorating Company?

A Yes, sir.

Q You don't recall seeing him there?

A No, sir.

THE COURT: All right.

EXAMINATION BY MR. WILSON:

Q Did you see him, Mr. Donovan, there when you first arrived?

A He was with me when I first arrived.

Q After you started the unloading?

A Yes.

Q How long did you see him when you first arrived and started the unloading process?

A He was in the back somewhere and that was the, about the last I have seen him.

THE COURT: All right.

MR. O'BRIEN: I feel that the array of photographs shown was unnecessarily suggestive.

THE COURT: May I see them, please?

MR. O'BRIEN: Yes. Included within those photographs were two photographs of Robert Donovan. ONe of those photographs had a moustache and sideburns drawn in prior to the--

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I take it that the moustache and sideburns were drawn in. I would think they were probably done by somebody connected with he government, because they were there when it was shown to the witness.

The fact that you have two photographs, one with a moustache drawn on it of Robert Donovan I think maybe the array was unnecessarily suggestive.

In addition to that, this witness did pick out two photographs, one of the defendant and one of another man -- who -- one of another man.

THE COURT: There is no indication of what other photograph he picked out.

MR. WILSON: There is nothing on the photograph itself, your Honor.

THE COURT: Which one is it?

MR. WILSON: This one.

THE COURT: We ought to indicate onthe other one with a designation on the back, B-1.

MR. O'BRIEN: Fine, your Honor.

xxxxx (Defendant Donovan exhibit B-1 marked for identification.)

MR. O'BRIEN: I move that the witness' testimony be excluded.

THE COURT: What do you say, Mr. Wilson?

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MR. WILSON: I think, your Honor, that the photographs themselves are certainly not suggestive, but most important, they were shown to this witness in April and he is coming here and has seen the live body and identified the body.

Regardless of whether they might be considered suggestive, he has an independant basis for his identification.

But really going back to the suggestiveness of the photos, they are a mixed bag and the two that he picked out do resemble each other. The one way which a witness can accurately tell whether he picked out, is when he sees him in the flesh and body, and that is what he has done in the court room.

I deliberately did not show him the photographs in preparation for this trial because I didn't want him to pick out the guy from the photos as the man he saw. He came in and picked out the defendant.

MR. O'BRIEN: I think that the man who he did pick out in the photograph, if he was present in the courtroom, he would have had a great deal of trouble in identifying who he actually saw that particular night.

MR. WILSON: That is the very point, the fact is he hasn't seen the photographs and is making this identification,

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is making it from his recollection of the man at that time and not from any photos that were shown him many months ago.

MR. O'BRIEN: Not many months ago as opposed to the time in question. The period of time, it occurred in 1972 and he was shown these photographs in 1973.

THE COURT: A total of 15 photographs here. I don't think there are impermissively suggestive and he did see the man, identify th person now after meeting on three separate occasions for a total of somewhere perhaps as much as ten minutes and he hasn't seen them since April and I will allow the identification.

Keep these as exhibits.

MR. O'BRIEN: One other point. I am going to question the witness before the jury basically the same as I have here. I don't however, want to offer the photographs into evidence because they appear to me to be police photographs. I don't want to get into that issues with the jury.

THE COURT: Any objection to that?

MR. WILSON: Not so long as it is agreed out of about 15 photographs, the witness selected the defendant on trial, both ten months ago and eight months ago.

MR. O'BRIEN: Whatever the dates were.

MR. WILSON: So long as the record is clear for the jury.

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THE COURT: All right, ready to cross-examine? Bring the jury in.

(Jury present.)

CROSS-EXAMINATION BY MR. O'BRIEN:

Q Who whom areyou employed?

A Atkinsch Freight Lines.

Q When this individual that you described as a Mr. Donovan came, where were you at that time?

A I was sitting in my cab of the trailer.

Q What did he say to you?

A Would I be interested in taking it to the other place for him, the delivery.

Q How do you know that he owned them?

A I didn't know it.

Q Do you mean a man you had never seen before came up to you and told you to pick up that freight, put it on your truck and come with me?

A No, one of the men who worked for Engels told me first that there was a man there to take the freight away on his truck, that the truck was too small and light to carry that much freight and that amount of pices and he said I think he is going to ask you to deliver them some place else for him. Ithink he was the first one that asked me.

Q Who was this man at Engels?

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A I don't know him. He worked for Engels.

Q Do you know his name?

A No, sir.

Q Does he still work for Engels?

A I wouldn't know. That is the last time I was ever in Engels.

Q It is your testimony, though, that you picked up merchandise and put it on your truck?

A No, the truck was loaded, already had come over the road from Baltimore, Maryland and it got into Jersey City to be delivered to Engels. The truck was already loaded. I was to unload it at Engels.

Q You don't know whether or not Mr. Donovan owned this material at that time?

A No, sir.

Q You never asked him for any identification?

A No.

Q Is that your normal procedure?

A No.

Q You would normally ask for identification?

A No, I would normally just deliver the freight where I had been told to deliver it, where it was consigned to.

Q How long a period of time did you speak with Mr. Donovan at that time?

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A Three or four minutes.

Q Tell us everything said during that period of time?

A As I say, first off, one of the men who worked at Engels asked me -- rather told me that the man who was to receive this freight in the end was there to get it, but he coldn't take it because the truck he had was too small and light --

Q This is a conversation that you had with Mr. Donovan?

A No.

Q Just limit yourself to the conversation youwere having with MR. Donovan.

A When I was finished with this other man, then this other man came over to me --

Q Who was this other man?

A This man there. And he said to me would I be interested in taking it to some other place and he would take care of me, give me $20.

Q YOu agreed?

A Right.

Q Would you say that took approximately thirty seconds?

A No, I think it was moreabout three or four minutes. I asked when I got there am I going to be unloaded right

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away, I can't be delayed. I will be on the route.

He said, "We will get you unloaded as quick as possible."

Q What day of the year or what was the date on which this occurred?

A The date on that --

Q March 3rd.

A -bill of lading.

Q Would that be March 3rd, 1972, the date that appears here at the bottom?

A Yes, sir.

Q What was this merchandise?

A Glass bottles.

Q Were they filled or empty?

A Empty.

Q Was there any label on those bottles?

A No, sir.

Q Just clear bottles?

A Just clear bottles, and clear cartons, no names, no nothing.

Q When you got to the place were you were to unload the truck, you followed Mr. Donovan there?

A That is right.

Q You observed his automobile Ithink you said?

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A No, his U-Haul-It truck.

Q You observed his U-Haul-It truck but you didn't have an opportunity to observe him, didyou, personally?

A No, I just followed the truck.

Q You saw the back ofhis head?

A I seen the back of the truck.

Q You couldn't even see his head then?

A No, sir, Iseen the truck.

Q Then when you arrived at this place where you were to deliver this merchandise, did you again speak with Mr. Donovan?

A When I lost him, I was parked at the side of the street and didn't know which way he went. Then he came back and found me and asked me where did I go. I asked him where did he go.

Q How long did that conversation take?

A I would say a couple of minutes.

Q Anthing else said?

A He just said, "Follow me, it is only just down the street a bit."

Q What time of day was this -- was this day time or night time?

A This is about 8:30, 8:45 in the morning.

Q How long was Mr. — a.m.?

A Yes, a.m.

Q How was MR. Donovan dressed?

A Dark suit.

Q He was driving the truck?

A Yes, sir.

Q Did he have a hat on?

A Yes.

Q What kind of hat?

A Fedora.

Q Could you tell whether or not Mr. Donovan had hair?

A No.

Q Could you describe Mr. Donovan?

A I would say he was tall, about 5-10.

Q Five ten? Heavy?

A Medium build, I think I said that.

Q Did he have any moustache?

A No.

Q No moustache? How about sidburns, long sideburns?

A No.

MR. O'BRIEN: May I ask Mr. Donovan to stand?

THE COURT: If you wish.

(Defendant Donovan stands.)

THE COURT: Are we going to have a demonstration?

MR. O'BRIEN: Just a demonstration.

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THE COURT: Next question.

Q Are you certain that the person you spoke to did not have sideburns and a moustache?

A Yes, sir.

(Defendant Donovan sits.)

Q Thereafter you were interviewed by postal inspectors, were you not?

A Yes, sir.

Q That occurred in November of 1972?

A Yes, sir.

Q Then you were again interviewed by postal inspectors in January of 1973?

A Yes, sir.

Q In January of 1973 certain photographs were shown to you, were they not?

A Yes.

Q A group of fifteen photographs shown to you?

A Yes, sir.

Q In those fifteen photographs there appeared two pictures of Mr. Donovan, is that not so?

A No, I don't think it was two pictures of Mr. Donovan.

Q I show you a group of photographs --

MR. O'BRIEN: May I have a moment with counsel?

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(Counsel confer.)

MR. O'BRIEN: May I have a side bar?

THE COURT: I don't think it is necessary. We have hadmore than our usual amount. I don't think it is necessary.

Q When you were shown those photographs, you picked out two of the photographs, did you not?

A Yes, sir.

Q Those photographs were not both of Mr. Donovan, were they?

A No, sir.

Q Different individuals?

A Yes, sir.

Q Then prior to orafter January 1973, youwere again shown those photographs, were you not?

A Yes, sir.

Q The same photographs?

A Yes, sir.

Q At that time what was said by the postal inspectors at that time?

A They wanted me to look them over again to be sure what Iwas saying.

Q At that time, that was in preparation for trial, is that not so?

A I suppose so.

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Q When did that occur?

A I think it was in April.

Q Of this year, 1973?

A Yes, sir.

MR. O'BRIEN: I have no further question of this witness.

MR. SHARGEL: I have no question of this witness, your Honor.

MR. WILSON: I think we ought to approach the side bar.

THE COURT: All right.

(At the side bar.)

MR. WILSON: Mr. O'brien has elicited that this witness picked out two pictures. He now leaves that very open-ended. I didn't anticipate he was going to leave it open and we indicated earlier that we will not offer the pictures in evidence. That now having been done, I find I must ask the witness to pick out the pictures he picked out and have them marked and let the jury decide.

MR. O'BRIEN: My objection is that I would not have gone into it if he had not brought it up and I had Mr. Wilson's assurance that he would not offer the pictures. I haven't offered them.

THE COURT: When you cross the lines and open it

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up, doesn't the rest go in?

MR. O'BRIEN: I would agree with Mr. Wilson what we talked about, that I will stipulate that the pictures that he picked out were of Robert Donovan and his brother Joseph.

THE COURT: Is that satisfactory?

B 12 MR. WILSON: And that the pictures are very similar in appearance.

THE COURT: Don't go into that.

MR. WILSON: One can have a brother and the two can look worlds apart. They look similar.

MR. O'BRIEN: I object to the two pictures going in. They do look like police photographs, and that raises a whole legal issue on this trial.

MR. WILSON: There is no indication that they are police photographs.

THE COURT: These are not mug shots.

MR. SHARGEL: There is a case in the Court of Appeals, and I don't have it at hand, in which they speak about the fact that photographs which have a front shot and a side shot --

MR. WILSON: I am prepared to put into evidence half of each of those so there won't be a front and a side shot.

MR. SHARGEL: If you cut one and just have the front view --

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MR. O'BRIEN: No, that still looks like a mug shot. How else would they have gotten it?

THE COURT: But you opened the door. You shouldn't have done that, that is the reason for it. Tjat is the trouble, th ey are left with the impression that he identified two different pople on photographs, one is his brother. I don't know whether they are similar or not. I am not making you do that, but if you can leave it with a proper stipulation, and phraseology, you may have a minute or two to do it and see if you can do it.

MR. O'BRIEN: If we could eleminate the "very".

THE COURT: Similar in appearance.

MR. O'BRIEN: That is the truth, too.

THE COURT: Is that satisfactory?

MR. WILSON: All right, your Honor.

(In open court.)

MR. WILSON: Ladies and gentlement, it has been stipulated between counsel that in lieu of showing you the photographs that Mr. Bausch selected, he selected the photograph of Robert Donovan and he selected a photograph of Robert Donovan's brother, Joseph Donovan, and both photographs show a very similar appearance.

THE COURT: A similar appearance.

MR. O'BRIEN: The "very" is all right.

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THE COURT: All right. Without going into it, there is a reason why the photographs cannot be shown to you at this stage of the game, and in lieu of that, we have stipulated. Is that it?

MR. O'BRIEN: Yes.

MR. WILSON: I have one question.

REDIRECT EXAMINATION BY MR. WILSON:

Q Mr. Bausch, government exhibit 19 in evidence contains the dates March 1st and March 3rd. Do you know exactly when you delivered these goods? Could it have been on some date other than March 3rd? Can you besure from this document exactly what date you made the delivery?

A March 3rd. It would have to beMarch 3, March 3 is on there.

Q March 1st is also on the document.

A That is the date it was shipped up.

Q At Carolina?

A In Baltimore.

MR. WILSON: Thank you?

THE COURT: Anything further?

MR. O'BRIEN: No, your Honor.

THE COURT: All right, next witness.

(Witness excused.)

MR. WILSON: The government calls James Chavis.

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JAMES C H A V I S, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. Chavis, who do you work for?

A I work for Ideal Decorating.

Q Where is that located?

A At 990- Foster Avenue, Brooklyn.

Q How long have you worked for Ideal?

A Seven and a half years.

Q What is your job with them?

A I work -- my job is accommodation foreman and mechanic.

Q Who owns Ideal Decorating Company?

A I deal is owned by Mr. Sidney Bookbinder.

Q Will you tell the jury just what Ideal does?

A Well, Ideal is in the business of silk screening commercial labels of cosmetic items -- various fields of printing.

Q What is this silk screen?

A Well, silk screen is no more than a frame and a plain piece of silk used for the purpose of printing on plastic bottles, jars.

MR. WILSON: May this be marked as Government ex-

hibit 20?

(Government exhibit No. 20 marked as an exhibit for identification.)

Q Mr. Chavis, is this a silk screen?

A Yes, it is.

Q Directing your attention to March of1972, did you have occasion at that time to silk screen jars with the label of Ultra Sheen Hair Conditioner and Dressing?

A Yes, I have.

Q Approximately how long did that job take?

A This job took approximately five days.

Q Approximately how many jars did y ou silk screen per day?

A Well, a jar of this size --

Q What size was it?

A This is an eight ounce and a jar of this size we could set up to do foughly five thousand a day.

Q Will you take and put government exhibit 20 for identification in front of you. I ask you to identify exactly what that is?

A This is a silk screen.

Q Is it the silk screen used at your company as far as you can tell?

A Well, this is, I would say, is one of ours.

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Q Let me show you what has been marked as government exhibit 21 for identification.

(Government exhibit No. 21 marked as an exhibit for identification.)

Q Could you tell us what government exhibit NO. 21 for identification is?

A This is a positive.

Q Called a positive?

A Called a positive.

Q Just what do you do with a positive in your business?

A Well, a positive is used -- this is what we use to make the silk screen, the process prior to making a screen. The screen is produced from this.

Q The process is started with a positive, and you use the positive to make the silk screen, is thatright?

A That is correct.

Q This silk screen is used to put the paint on the jars?

A That is correct.

Q Now, Mr. Chavis, prior to taking the stand today you have examined the jars that are contained in the cases that have been marked government exhibits 8, 9 and 10, for identification, haven't you?

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A That is correct.

Q As well as the jars that are marked 5, 6 and 7 for identification?

A That is right.

Q You have compared the positive that you have there with the jars, is that right?

A That is right.

Q Is thatpositive, is that a silk screen used to produce those jars?

MR. SHARGEL: Mr. Wilson is testifying. I object.

THE COURT: Yes, rephrase it.

A Yes.

THE COURT: You are leading the witness.

Q What is the process called by which those jars have been labeled?

A Well, that is the actual silk screening process.

Q Were those jars heated in any way?

A No, they were not.

Q What do you call it when you don't heat the jars to put the paint on?

A The alternative is the cold process.

Q Cold process?

A That is the cold process.

MR. WILSON: May this be marked as government

exhibit 22 for identification.

(Government exhibit No. 22 marked as an exhibit for identification.)

Q Mr. Chavis, I show you government exhibit 22 for identification. Can you identify it?

A Yes. This is an invoice used by our company, one of our invoices.

Q Is that invoice made in the regular course of the business of Ideal Decorating Company?

A Yes.

Q Is it the regular course of business of Ideal Decorating Company to make that invoice at or about the time reflected on it?

A I would say so, yes.

MR. WILSON: The government offers it in evidence.

MR. O'BRIEN: I would like to see it.

MR. SHARGEL: Is Mr. Wilson offering 22 or 21? And 20 also?

THE COURT: 22 is offered now.

MR. SHARGEL: Well, your Honor, note my objection on the grounds previously stated.

THE COURT: Yes. May I see the exhibit, please? Any objection?

MR. O'BRIEN: Yes, I object to it.

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THE COURT: Step up, gentlemen.

(At the side bar.)

THE COURT: What is 14 Metropolitan Avenue?

MR. WILSON: The government will prove that 14 Metropolitan Avenue doesn't exist and that there is no such Zimmer Associates there.

The government has already proven, your Honor, that a load of jars were brought to Ideal DecoratingCompany on March 3. Here is an invoice in March and it is another circumstance that the jars were labeled by Zimmer Associates.

The government will argue 14 Metropolitan Avenue suggests whatever it suggests.

THE COURT: Let us withhold that. I won't pass on it and you don't need any witness for anything further.

MR. WILSON: But may I question as to what the Court's problem is?

THE COURT: It may be there is a Zimmer Associates at 14 Metropolitan Avenue, Brooklyn, New York.

This is Ultra Shine.

MR. WILSON: May I read it to the jury?

THE COURT: NOt at this time. All right, re-offer it.

MR. O'BRIEN: I would like to cross-examine on other invoices with this witness. I would like to get the

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invoices prior to and subsequent.

THE COURT: You go ahead and do what you want. I am not telling you how to try your case.

MR. O'BRIEN: Yes, sir.

(In open court.)

MR. WILSON: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION BY MR. O'BRIEN:

Q Mr. Chavis, what is your function at Ideal Decorating?

A Well, I am the mechanic and the foreman.

Q Who owns thatbusiness?

A Ideal is owned by Sidney Bookbinder.

Q Is he still alive?

A Yes, sir, he is.

Q Where is you business located?

A 9909 Foster Avenue.

Q In Brooklyn?

A In Brooklyn.

Q Are you the bookkeeper or record keeper of Ideal Decorating?

A No, sir, I am not.

Q Does Ideal Decorating have a bookkeeper or record keeper?

A No.

Q You testified that government exhibit 22 for identification is a record kept by Ideal Decorating in the ordinary course of Ideal's business?

A That is correct.

Q Have you ever seen those records?

A What records are you talking about?

Q You said that exhibit 22 was one of the records that Ideal Decorating kept in the ordinary course of its business?

A Yes. Thatis what I meant, that is the procedure.

Q Right. They kept invoices, is that true?

A They do.

Q This is an invoice dated March 10, 1972?

A that is right.

Q There is an invoice number on it, is there not?

A Yes, sir.

Q They would also keep the invoices numbers -- is there an invoice number?

A I would imagine there is.

Q Read the number to us.

A 03951.

Q So, therefore, Ideal Decorating has in its possession at this time 03952, has it not?

A It should have.

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QIt would have the prior invoice to that, for example, 039502

A That is right.

Q Would you get those records and also bring those records in with you tomorrow?

MR. WILSON: There is a procedure by which Mr. O'Brien can get that.

THE COURT: I am aware of that.

A The question is could I bring this record in tomorrow? I could try, but I can't say. That is not exactly my function.

THE COURT: You are a mechanic?

THE WITNESS: I am a mechanic. The administrative branch is another part of this business.

Q Who is in the administration branch or part of this?

A This would have to come by Mr. Bookbinder.

Q Did Mr. Bookbinder -- he did not bring this piece of paper to you, did he?

A No, he didn't, not that I know if.

Q You are here to testify today regarding that piece of paper?

A Yes.

MR. WILSON: He is to testify to what he testifies

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to.

Q Will you bring those papers that I requested?

THE COURT: He indicated that it is not his duty, that branch of the business. He is a mechanic, and described the screening process that you go through, isn't that right?

THE WITNESS: That is correct.

MR. O'BRIEN: I have no other questions.

BY MR. SHARGEL:

Q Do you know Dennis D'Amato, sitting right here?

A No, I don't.

MR. SHARGEL: Thank you, sir.

BY MR. O'BRIEN:

Q Do you know Mr. Robert Donovan?

A No, sir, I don't.

Q You also indicated that this silk screen, which is ogvernment exhibit 20 for identification, could be the silk screen owned by Ideal Decorating?

A Yes.

Q Is that right? Do you know? Do you know for a fact that it is or is not?

A I am most certain that it is.

Q Do you know?

A Because I made it.

Q Did you make this particular silk screen?

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A Yes,

Q Are you sure of that?

A Yes.

Q Do you know at whose request you made that silk screen?

A Well, I will try to answer your question in this way. We have a procedure wherein whenever we get a job, the job comes in from the office, a bill and an order come into me.

Q Did Mr. Bookbinder -- is he your boss?

A Yes, sir.

Q Did he ask you to make this silk screen?

A In a sense when he hired me, yes.

MR. O'BRIEN: I have no further question.

MR. WILSON: No questions.

THE COURT: Anything further, gentlemen?

Thank you very much.

(Witness excused.)

THE COURT: Next witness.

MR. WILSON: May I check to see if I have another witness?

THE COURT: You mean you may be out of witnesses? All right.

(Pause.)

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M.R WILSON: Might I have about three minutes and I think I can bring on another witness.

THE COURT: I will give you five minutes. We will take a short recess.

(Recess.)

MR. WILSON: The government calls Henry DAvis.

H E N R Y M. D A V I S, called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. WILSON:

Q Mr. davis, where are you from?

A I am living in the Washington, D. C. area.

Q Who do you work for?

A The Food and Drug Administration.

Q How long have you been with the Food and Drug Administration?

A Since early in 1960.

Q What is your present position?

A I am an analytic chemist and also in the office of acting chief, product compostion branch.

Q Will you tell the jury where you went to school?

A I received a Bachlor of Science degree from North Carolina College and a Master of Science from Howard University.

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MR. SHARGEL: We will stipulate the qualifications.

MR. WILSON: The j ury is entitled to hear what he did.

Q In what field have you become involved at the Food and DRug Administration?

A My entire work has been in the area of analytical research on the composition of cosmetic products.

Q What is the nature of your work?

A To identify ingredients used in cosmetic products and to identify ingredients that maybe harmful, that maybe included in the formulation of cosmetic products.

Q At the request of the postal Inspection Service did you conduct a chemical analysis of jars bearing the label Ultra Sheen?

A Yes, I did.

Q I place in front of you five jars, marked government exhibits 3, 4 5, 6 and 7. Are those jars which you analysed?

A Th ey are.

Q Could you tell the jury what the overall result of your analysis was as to the contents of those jars?

MR. SHARGEL: I think we could stipulate what ones were Ultra Sheen and what ones wern't. I don't think we ought to waste the time.

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THE COURT: Can you agree on what you are going to stipulate?

MR. SHARGEL: Absolutely. May we have just one minute?

THE COURT: Certainly.

(Counsel confer.)

MR. SHARGEL: We can stipulate, your Honor.

THE COURT: Mr. Wilson, you present the stipulation and see whether it is agreed.

MR. WILSON: Ladies and gentlemen of the jury, to avoid a detailed chemical analysis of these products, the stipulation is that government exhibits 3 and 4 contain a substance in each of 3 and 4 which is similar to each other.

Government exhibits 5, 6 and 7 contain something in them that is similar to each other and what is in 3 and4 is not in 5, 6 and 7.

Is that basically right?

MR. O'BRIEN: Yes, absolutely.

MR. SHARGEL: Yes.

MR. WILSON: The government has no further examination.

THE COURT: Any cross-examination or any questions? All right, Mr. Davis, thank you very much.

(Witness excused.)

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MR. WILSON: We don't have any witnesses available right now, your Honor.

THE COURT: All right, will yougentlemen approach the bench a moment?

(At the side bar.)

THE COURT: How much long er do you expect to be?

MR. WILSON: A half a day.

MR. O'BRIEN: Well, I definitely intend to subpoena the invoices. I will issue a subpoena at this time to be served by the marshals right now.

THE COURT: Unless you can avoid it by having MR. Wilson call up and ask in effect to bring them over.

MR. WILSON: The only thing I am prepared to do is make available to the defendant Mr. Sidney Bookbinder who has to bring the records with him and calling Mr. Bookbinder as their witness and the defendants obviously don't want to do that, and yet that is the way to develop what they want to develop, which is to establish that Mr. Bookbinder is a crook.

MR. O'BRIEN: I don't know why the government has not called Mr. Bookbinder.

THE COURT: That is something else. I will tell the jury that we may finish tomorrow.

MR. O'BRIEN: May I finish one point?

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THE COURT: Let me excuse the jurors nntil ten tomorrow.

(In open court.)

THE COURT: Members of the jury, we are going to adjourn for the evening. I was trying to ascertain about the balance of our time table and what it would be and I haven't advanced and I have no more information than I had before. It is difficult and I am not critical of anybody, but it is difficult to say.

I don't know whether it will go to you tomorrow or not. If it doesn't get to you for decision tomorrow, it will sometime obviously on Thursday. You will get it sometime early Thursday. That is what you would like to know, subject of course to anything that can develop, and we will proceed.

Tomorrow morning I have a shortmatter on at 9:30 and it is not likely that we can start before ten o'clock. So would you be good enough to come at a quarter to ten and give us a little lee way there and remember what I said to you before. If you get tied up by a circumstance which is not in your control, the trains don't come in or the subway is not running or some other reason other than your own lateness or over-sleeping I won't be upset, nor will the other poople who depend on you be upset, but try and make it by a

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quarter of ten.

This is the first long recess we are going to have since we commenced this case. For some of you this is a novel experience, being on a jury, and y ou are going to go h ome tonight and those in your household are likely to ask you what ;you did today and what it is all about and you are perhaps anxious to talk about it too.

Remember my admonition not to discuss this case with anybody and don't let anybody discuss it with you. There is a very simple reason why you can't discuss it with anybody else. You yourselves have seen thewitnesses on the stand, you have heard the testimony and anybody in your household, they might talk about it and say something about this and they haven't seen the people whom you have seen and haven't heard the witnesses that you have heard. It is your decision to make. It won't be long before it will be submitted to you and between now and then don't discuss it with anybody and have a pleasant evening and we will see you in the morning about a quarter to ten.

(Jury left the courtroom)

THE COURT: We had a little discussion at the side bar that we hadn't completed.

MR. O'BRIEN: If necessary I will subpoena Mr. James Chavis to bring in those records of Ideal Decorating.

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I don't know why the government seems to be pushing me to call Mr. Bookbinder, they have enough reasons for me not to want to call Mr. bookbinder.

THE COURT: Well, since the government has introduced, at least before the court for consideration, it hasn't gone into evidence yet, and --

MR. O'BRIEN: If it hasn't gone into evidence, there is no reason to call anybody. I have some reservation about its admissibility on technical grounds.

MR. WILSON: Which technical grounds?

THE COURT: The Zimmer Associates, 14 Metropolitan Avenue, Brooklyn, New York, and that is Ultra Shine, although there is a great deal of similarity between the two.

What can you do?

MR. WILSON: Connect the name Zimmer Associates that connects the number of cartons, 475 cartons listed on the invoice, 5 cartons broken. We have in evidence government exhibit 19 which shows that 480 pieces were delivered to Ideal and that delivery was from Zimmer Associates and the same Zimmer, the same shipment.

We have the same number of pieces that are involved in the overall scheme, we have the same date.

The government will introduce in evidence and show that 14 Metropolitan Avenue doesn't exist, or if it exists,

it is a building that is not occupied by anything like Zimmer Associates. It is just another piece that is admissible and which is a question for the jury, but not for keeping it out altogether.

THE COURT: Zimmer Associates might be in another county and they only have to file a d/b/a certificate in the county in which they are doing business and Brooklyn is a very big borough and it might have been a Zimmer Associates in Brooklyn.

MR. WILSON: That is no concern of the court, that has to do with the weight of the evidence, but not as to its basic admissibility. There is enough in the record now linking up this invoice with the other facts which would make it admissible and it is a question forthe jury to decide.

MR. O'BRIEN: Also, I would like to point out that Mr. Chavis was not the proper person to --

THE COURT: No objection was made on that ground.

MR. WILSON: He may not be the guy who makes them, but he also testified that there are administration people that make them.

MR. O'BRIEN: And since it has not been introduced in evidence, I make that objection atthis time.

MR. WILSON: That was a document made in the regular course of business and I did ask the questions and

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they are admissible and the right questions were asked and the right answers were given and the witness testified that he is basically familiar with the procedures folbwed; he is the foreman, he has been there seven and a half years.

THE COURT: All right. Without them having to subpoena Mr. Bookbinder and get the invoices preceding and subsequent to this one, can you do anything?

B15 MR. WILSON: I can find out if there is such an item. Mr. O'Brien's point in all this is to show that Mr. Chavis went back to his office and couldn't find one, and that isnot the right way to do it.

The real point that he is making is that this is a phony,, this is the man who made this who should be called as a witness and that man is Mr. Bookbinder.

MR. O'BRIEN: I am not going to be sandbagged into calling Mr. bookbinder.

MR. WILSON: It is a question of the truth.

THE COURT: Do you have the preceding and subsequent invoice?

MR. WILSON: I have no idea. The government --

THE COURT: Can't you find that out first?

MR. O'BRIEN: It is m y contention in this trial that this invoice was prepared and is a phony and that it was prepared, I mean this very seriously -- I don't question

the other documents and make this kind of accusation unless I have some reason for it. I do have a reason to believe that this invoice was prepared not on or about March 10, 1972 but rather somewhere around January of 1973, when the Postal Inspectors came in to Mr. bookbinder and I think Mr. Bookbinder, to get himself off the hook, made up an invoice.

Therefore, if I could find out that the invoice number 03951 is dated after December 1972, Ithink that would be proof that the invoice was not prepared on March 10.

THE COURT: I am not going to tell you how to try your case.

MR. O'BRIEN: I would ask Mr. Wilson just to save me the trouble of going -- first to ask Mr. Chavis to return tomorrow with the invoices for March of 1972.

MR. WILSON: What is Mr. Chavis can't find them?

MR. O'BRIEN: Then I shall argue to the jury why have they kept this in the regular course of business and all other invoices have been lost or destroyed. That is because it was turned over, we now have to start getting into a collateral issue as to whether this was prepared by Mr. Bookbinder.

THE COURT: All right, Iam not going to issue any orders. I will sign any subpoenas you issue. I am just trying to avoid delay.

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MR. O'BRIEN: The second point that I would like to raise with the court is the issue of the moustache on Robert Donovan. The one witness that immediately comes to mind that can come here and testify that at that time Mr. Donovan did not have a moustache -- I mean did have a moustache, I knew Mr. Donovan at that time.

THE COURT: You know the problems of attorneys having knowledge appearing on the stand.

MR. O'BRIEN: That is why I bring it up and didn't call myself.

MR. WILSON: What Mr. O'Brien is suggesting is that he be allowed to take the stand in this case and the government violently objects and obsiously, there are other people that knew Mr. Donovan at that time and certainly one of them can be produced to testify as to whether he had a moustache or not.

MR. O'BRIEN: It could be Mr. Donovan's brother.

MR. WILSON: There is one further matter that I must bring up at this time. The reverse side of government exhibit one in evidence, the government's position is that whole document is in evidence for what it is worth and I am entitled to use the data on the reverse side for some further proof. If the court will rule otherwise, I would have to start making arrangements to bring one or two other witnesses that it was

prepared in the normal course of their business, and that is was their business to make those entries at or about the time that they are in there. That is the only thing that hasn't come in to amke them admissible as far as I can see.

MR. O'BRIEN: The witness testified, he said normally those entries are made on the front.

THE COURT: He also said there is a place for it on the front, that came out.

MR. WILSON: The witness did testify in the normal course of his business he makes entries on this card as to the address and telephone number of the person who has the service. Now, thatis what he said, the regular course of business, that entry is made.

THE COURT: This is a business record kept in the regular course of business and they put those entries on there at or about the time that the information is available and it is admissible. I wasn't looking for that at that time. It came in because I dont think any of us were aware what was on the back.

MR. WILSON: The government was aware.

THE COURT: You should have brought it out.

MR. WILSON: It is no secret, that was my very next question.

THE COURT: You may get the record of that particu-

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lar part that covers it.

I am not certain of it. I wasn't focusing on that at the time. My clerk says it did come in, but that is the best record of that.

MR. WILSON: The only problem I have is this: If the court would rule that this did not yet come in, I would have to call some other witnesses as to this piece of proof, as this is of some importance to the case and I thought it had been proven.

THE COURT: I will have to get back to you and see if it is there.

(Adjourned to December 19, 1973, at ten a.m.)

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United States of America

vs. 73 Cr. 1093

Robert Donovan, a/k/a George Zimmer and Dennis D'Amato,

Defendants.

December 19, 1973

(Trial resumed. 10:15 a.m.)

(Present: Both defendants and all counsel.)

THE COURT: I received requests to charge from the government and from Mr. O'Brien, and I will rule on them before you sum up.

You have indicated that you are going to require testimony all morning. It is entirely possible, gentlemen, that you will sum up after lunch, right after lunch, and I may send this case to the jury, if it is not too late in the afternoon, and I won't restrict you on your summations but I don't know of any reason why they should be of great length.

I have a problem, Mr. Wilson, and I wish you would enlighten me on it, as to Count 1.

MR. WILSON: With respect to what part of it?

THE COURT: Well, Count 1, I don't know. I want to see the law on it. Count 1 says there was a phone call to a witness.

MR. WILSON: Count 1 is the letter.

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THE COURT: It is a letter from Hussey to Mr. Zimmer.

MR. WILSON: That is correct, your Honor.

THE COURT: It was following a phone call of the day before.

MR. WILSON: That is correct, your Honor.

THE COURT: And I think that the testimony of the witness was that the letter was not solicited nor was there any indication that the letter ought to be sent.

Have you got a specific case on this point?

MR. WILSON: Your Honor, I can provide a specific case that says that if the use of the mails could be foreseen, although the particular use was not intended, that is sufficient to support a mail--

THE COURT: I'm aware of that general language. In this case the witness did say that, well, the letter was not asked for, but all right. Furnish me with any case that you have and do it before lunch, all right? Or at lunch time.

MR. WILSON: Yes, sir.

THE COURT: You may be perfectly right, Mr. Wilson, but right now I have some hesitancy on that count.

MR. WILSON: Well, your Honor, I would simply say that when businessmen are dealing that way and the

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content of the letter itself makes it clear that this is a normal kind of confirming letter, "Samples are coming from Baltimore; I'm telling you they are coming under separate cover; This is to confirm what we talked about," it's just the thing a salesman would do, and it's under the general rubric that although a particular letter is not intended if it could be reasonably foreseen that the use of the mails would occur, that is sufficient to sustain the jurisdiction on that count.

THE COURT: Well, I can see some of these cases, and I have had them, where they put advertisements in the newspapers, and letters, naturally, follow thereafter as a matter of course, but if I have a conversation with somebody and just say, "My name is Zimmer and my address is so and so," and the fellow asks, in answer to it, as they do sometimes, "Do you have jars, and stuff like that?" and then, on his own initiative, the recipient of that call just writes a letter, I am wondering whether or not that's what is intended to be covered by the statute; at least in this case.

MR. WILSON: I think the first case you postulated is obviously an easy one. This case, your Honor, has got more in it than simply Mr. Hussey, out of the blue, sending the letter.

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THE COURT: Well, we will argue it later.

MR. WILSON: Your Honor, rather than do this in frontof the jury--

THE COURT: The vouchers?

MR. WILSON: --I have two pieces of evidence that are pending.

One is Government's Exhibit 1 with respect to the reverse side, and the other is Government's Exhibit 22, which is the invoice from Ideal which says that 475 cartons of 8-ounce jars of Ultra Sheen were consigned to Zimmer and Associates.

I have offered them both as business records for everything on them and I just--

THE OCURT: That first one you indicated, I believe, and in my notes, the clerk's notes, or somewhere, there was an indication in his testimony that it is customary to make those kinds of notations on the reverse side, and I believe I'm going to let that go in evidence.

The other one I am still reserving on. You don't have to know about that. You don't have to get it in yet, do you, Mr. Wilson?

MR. WILSON: No, your Honor.

THE COURT: But you do want to get it in before the case goes to the jury?

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MR. WILSON: Yes. I also was going to start by offering two objects offered by Mr. Chavis that had not come in.

THE COURT: Any objection?

MR. O'BRIEN: Yes, on the practical level, your Honor, because Mr. Wilson and I have been having somewhat of a problem with Mr. Chavis, and if he wants to get them in, I do object to them.

MR. WILSON: They have been authenticated by the witness.

THE COURT: He says these are the ones that he himself did, and so forth.

MR. WILSON: That's right.

THE COURT: I will allow those to come in, and I will reserve ruling on the offer, then, on 22.

MR. SHARGEL: My objection to these is on the grounds of relevancy. Once again, we had a lot of exhibits coming in yesterday--I think they are numbered in the 20's--and there is no connection with regard to these exhibits and the defendant D'Amato.

I would again ask for a limiting instruction that they are not binding on the defendant D'Amato.

THE COURT: Let the entire case come in first.

All right. Ready?

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(At the sidebar.)

MR. O'BRIEN: I just thought of this right at this moment about that affidavit.

Isn't that a statement by one co-defendant that might possible involve another co-defendant? I just can't think of the case--

THE COURT: Bruton is the one you are thinking of.

MR. WILSON: There is no Bruton problem in this affidavit,your Honor, because it does not mention Robert Donovan by name and, in fact, it denies any involvement in the counterfeit scheme saying that the merchandise was purchased from a company called Balzac Trading Corporation. It is that allegation, that it was purchased from Balzac Trading Corporation, that the government will prove to be false which forms the basis of Count 3.

THE COURT: And it is solely against D'Amato, isn't it?

MR. WILSON: That's correct, your Honor.

THE COURT: If you are satisfied there is no Bruton problem, all right.

MR. O'BRIEN: At least for the record, I wanted to make the objection.

THE COURT: Yes.

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MR. WILSON: Yes, your Honor.

THE COURT: Bring the jury in.

(The jury entered the courtroom.)

THE COURT: All right, here we are, ladies and gentlemen; let's proceed.

MR. WILSON: Your Honor, at this time the government offers into evidence what has been marked as 20 for identification and 21 for identification.

THE COURT: All right. They will be received in evidence. 20 and 21 are now in evidence.

(Government's Exhibits 20 and 21 were received in evidence.)

MR. WILSON: May I have this marked as Government's Exhibit 23 for identification.

THE COURT: Yes.

(Government's Exhibit 23 was marked for identification.)

MR. WILSON: Your Honor, I have a stipulation that I would like to read to the jury.

THE COURT: All right. A stipulation, members of the jury--

MR. O'BRIEN: May we approach the sidebar for just a moment?

THE COURT: All right. Step up here, please.

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(In open court.)

THE COURT: All right. We are going to take a short recess, members of the jury. I'm sorry we didn't do this before you came out but it is one of those things that came up at the last minute.

All right.

(The jury left the courtroom.)

THE COURT: I am having some difficulty with paragraph 6 on page 3.

MR. WILSON: Your Honor, that is the beginning of the false statement that the government has charged in Count 3 of the indictment against the defendant.

THE COURT: Isn't that a way of using one statement of a co-defendant against the other?

MR. WILSON: No, your Honor.

THE COURT: Isn't that like Mr. D'Amato testifying that the product in here was phoney, as far as Mr. Donovan was concerned?

MR. WILSON: No, your Honor.

As you read on, your Honor, you will find that Mr. D'Amato then says where he got it from.

THE COURT: I know he says where he got it from but--

MR. WILSON: And that is not from Mr. Donovan.

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He says, "I got it from Balzac."

If the government can establish that this did not come from Balzac, it means that Mr. D'Amato was lying about that. It doesn't mean that it was Mr. Donovan who was the supplier.

Independent testimony of that will come in to show that it is Mr. Donovan and that is what the case has been about thus far.

THE COURT: It says, "I had no knowledge of the manufacture of the product and I had no suspicion or reason to suspect the product which I purchased was a fraud or a counterfeit, or that the labels and markings on the product were placed there in violation of any registered trademark or of any law."

MR. WILSON: Your Honor, if two people were arrested at the same time for the commission of a bank robbery and one of them gave a false statement as to why he could not have been the man, one of the two involved, and the government sought to introduce that as a false exculpatory statement, it has the same relationship to this affidavit. It is the same kind of factual situation, and that's a case where obviously it would be admissible to show consciousness of guilt.

THE COURT: Let me think about it for a few

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minutes, would you?

MR. WILSON: Surely, your Honor.

MR. SHARGEL: Judge, there is one other thing which I find is not exactly at point but perhaps your Honor has taken time to consider it and may also consider this:

On page 7 of the affidavit there is one sentence which reads, "I never again dealt with the product called Ultra Sheen."

It's handwritten. I would proffer the fact that it is not in the handwriting of my client, Dennis D'Amato, who signed this affidavit. There are no initials to indicate that it was properly included in the affidavit that was signed, and I would move that that portion of it be stricken.

MR. WILSON: Your Honor, I violently object to that on a number of grounds.

For one thing, I raised this very point with Mr. Shargel weeks ago when I did not have a certified copy of the affidavit. He did not raise any problem about it at that time.

This affidavit was filed as is in the court. It is obviously an addition that was made in the affidavit either by the lawyer who notarized the affidavit or by the defendant himself, but the point is, this is the

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statement filed.

If Mr. Shargel is saying that his client did not know about that, then I guess we will have to call Sylvia Garland, the lawyer who was responsible for the filing of this document. We were going to stipulate to all this and she was not going to be here.

THE COURT: All right. You fellows talk about that, but the fact that there are no initials on it doesn't mean anything.

The question is whether this was in the original when it was filed.

MR. WILSON: It was clearly filed--

THE COURT: Whether that was in there at the time that he signed the affidavit.

MR. SHARGEL: That's the question, Judge.

THE COURT: Have you stipulated to that?

MR. WILSON: We stipulated that this was the affidavit that was filed.

MR. SHARGEL: The stipulation that I agreed to--

MR. WILSON: Your Honor, maybe we can work this out.

THE COURT: All right.

(Recess.)

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THE COURT: All right, have you worked out your stipulation or not?

MR. WILSON: I believe,your Honor, it will not be necessary to argue about that point. It will simply go in as part of the affidavit.

MR. SHARGEL: That's correct.

THE COURT: Very well. All right. I am reasonably convinced that the Bruton problem, while it appears on the surface here, is not involved. It is involved to some extent, and I don't believe that it meets the test of Bruton in such a way that I should exclude it.

On the other hand, you gentlemen knew that this was going to be involved as a question. This case has been hanging fire for three weeks; why don't you brief it for me ahead of time?

MR. WILSON: Your Honor, I seriously don't believe there is a Bruton problem.

THE COURT: Well, there is a problem in the first instance if it is raised. It's got to be looked at.

Right now I'm satisfied in my own opinion that it isn't involved, but you knew it had to be raised before this.

MR. WILSON: Frankly, your Honor, I really don't see a Bruton problem.

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THE COURT: I will have to caution this jury that this stipulation and this affidavit solely relate Count 3 and are to be considered only on Count 3, which is solely against Mr. D'Amato and is not to be considered in any way in so far as the counts involving Mr. Donovan.

MR. WILSON: Your Honor, in the interim, a lot of my witnesses have arrived and, with the court's permission and indulgence, I would like to switch tactics and I simply wish to get rid of these witnesses. There's a whole roomful of them.

THE COURT: All right.

MR. SHARGEL: Just one second, your Honor.

(Pause.)

THE COURT: All right. Get your witness out here and we will bring the jury in at the same time.

Somebody said Hanakah starts tonight and I don't know if that creates a problem with any of the jurors or not. I know it is a Jewish feast, I don't know if they are required to be out of here at a particular time or not. I will ask them to send me a note as to what they want to do about it.

(The jury entered the courtroom.)

THE COURT: Well, I regret that we were not able

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to resolve it before you came in but legal problems do come up and I indicated to these lawyers at the very beginning that I don't want any argument in the presence of the jury on legal problems that might involve some things, and unfortunately we had you walk in and then the problem came up and we had to have you file out again.

Well, we resolved the legal problem and it does take a little time sometimes and a little time here saved may save a lot of time later on.

The other situation, at the next recess, it was brought to my attention, and I am aware of it, that tonight begins the Jewish festival of lights which we know as Hanakah, and if you would send me a message in writing as to what you wish done about it, any particular jurors involved, send it to me at the next recess and I will look at it and see what we can do about it.

MR. WILSON: Your Honor, the government calls Frank Capello.

FRANK J. CAPELLO, called as a witness by the government, being first duly sworn, testified as follows:

THE COURT: Mr. Capello, you want to speak in a loud voice so that everybody here can hear what you have to say. We may have to remind you but we won't have to remind you if you keep your voice up.

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DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Capello, who do you work for?

A Jones Trucking Company.

Q What does Jones Trucking Company do?

A General cargo, shipping.

Q What is your job with them?

A OS and D clerk.

Q Would you tell us what that is?

A I notify consignees at the time freight comes in that their freight is available and ready.

MR. WILSON: May I have this marked Government's Exhibit 24 for identification, please.

(Government's Exhibit 24 was marked for identification.)

Q Mr. Capell, can you identify Government's Exhibit 24 for identification (handing)?

A Yes. This is a document we used. When a consignee comes down for his merchandise or freight, he has to sign this in order to get the release of the freight.

Q Is that document made in the regular course of the business of Jones Motor Freight Company?

A Yes, it is.

Q And is the regular course of the business to make

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that document at the time that the events happen?

A That's right.

MR. WILSON: The government offers it into evidence.

THE COURT: Show it to counsel.

MR. SHARGEL: I would have the same objection that I interposed to the other exhibits, your Honor.

THE COURT: What is that?

MR. SHARGEL: On grounds of relevancy to my client.

THE COURT: All right. Taken subject to connection in so far as the defendant D'Amato is concerned.

It is received in evidence.

(Government's Exhibit 24 for identification was received in evidence.)

Q Mr. Capello, does your name appear on this document?

A Yes, it does.

Q Is that your signature at the top?

A Yes, it is.

Q Is the signature of the person who received the merchandise from you on that document

A It is at the bottom of the receipt.

Q And that person who received the merchandise from

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you, did he pay for it at the time?

A Let's see. Paid in cash at the time of pick-up.

Q And what was that shipment?

A It is from Sterling Seal out of Erie Pennsylvania to Zimmer and Associates of Jones Motors. In other words, this is held in the terminal, the consignee is called and notified that the merchandise is available and ready.

Q And what was the merchandise?

A Cap covers, discs.

MR. WILSON: Thank you. No further questions.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Mr. Capello, I draw your attention to the signature that appears down at the bottom in ink; do you know who wrote that?

A The party that took the merchandise.

Q I mean were you there when the party took the merchandise?

A I gave them the merchandise. I put the license plate number of the vehicle that came down to make the pick-up on there.

Q Do you recognize that person in court today?

A No.

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Q He's not in court?

A I get a lot of people coming in all day long.

Q You were in the witness room in the back prior to coming out here and testifying, isn't that so?

A Yes.

Q There were other people in that witness room?

A Yes, there were.

Q Did you recognize any of the other people in the witness room as the person who picked up that merchandise?

A There was a tall fellow that was sitting towards the window today that looked like him.

Q Would you describe the man, then, that picked up the merchandise?

A Well, if it is the same party, he's about 5' 10 or 11--something like that. He was sitting down.

Q How old was he?

A Like grayish hair a little bit.

Q Approximately how old?

A I would say around 50, 52, 55, like that.

MR. O'BRIEN: I ask that this be marked as a Defendant's Exhibit for identification.

(Defendant Donovan's Exhibit C was marked for identification.)

Q I show you Defendant's Exhibit C for identification

and ask if this man resembles the man who came down and picked up the merchandise.

A I don't recall it really. He don't look familiar. I mean, you know, like I told you, there's a lot of people that come in and out of that place.

MR. O'BRIEN: I have no other questions.

THE COURT: Anything Mr. Shargel?

MR. SHARGEL: No questions, your Honor.

REDIRECT EXAMINATION

BY MR. WILSON:

Q You said you saw a man in the witness room about 5' with gray hair, is that right?

A Yes.

Q Did you ever meet a postal inspector by the name of Gene McHale?

A Oh, yes.

Q Is that the fellow you referred to?

A Yes, that's it.

THE COURT: Anything further?

RECROSS-EXAMINATION

BY MR. O'BRIEN:

Q Mr. Capello, on this paper, in red ink you have a license number written down.

Would you tell us what that is?

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A Any vehicle that comes to make a pick-up, at the terminal, that is, I keep the license plate number of the vehicle that comes to make the pick-up.

Q So that's the license plate number of the vehicle that picked up this merchandise?

A At the time.

MR. O'BRIEN: No other questions, your Honor.

THE COURT: Anything further?

MR. WILSON: Nothing, your Honor.

(Witness excused.)

MR. WILSON: At this time I would like to pass this document around and direct the jurors' attention to the signature.

THE COURT: All right.

(Mr. Wilson hands document to the foreman of the jury.)

THE COURT: Next witness.

MR. WILSON: The government calls Robert D'Amato.

ROBERT D'AMATO, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. D'Amato, I'm sorry that it is necessary to call you.

MR. SHARGEL: Objection.

THE COURT: Sustained. The jury is to disregard that statement. No comments. Just question the witness please.

Q Are you related to the defendant D'Amato on trial here?

A He's my brother.

Q Is he seated here at the end of the table?

A Yes.

Q What do you do for a living?

A Drive a truck.

Q Do you see anyone else at this table that you recognize that you have seen before?

A The guy over there on the corner.

Q Is that Mr. Donovan?

A I don't know his name.

Q Have you seen him before?

A Yes.

Q Where have you seen him?

A Emerald Cosmetics.

Q I still can't hear you.

A Emerald Cosmetics.

Q What is that?

A I really don't know. I just go up there to pick

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up merchandise.

Q During the year 1972, how often would you see your brother?

A How often do I see my brother?

THE COURT: In 1972.

THE WITNESS: I see him every day.

Q Mr. D'Amato, I show you Government's Exhibit 24 and I ask you if you can recognize the signature at the bottom of it?

A Yes.

Q Is that your signature?

A Yes, it is.

Q Did you pick up the jar-caps from that shipment which is reflected by Government's Exhibit 24?

A I don't know.

Q Did you pay the charges for that shipment?

MR. SHARGEL: I object to the leading.

THE COURT: Yes.

Q What can you tell the jury about that shipment on that document?

A I can't tell nothing. I just--at that time I used to pick up merchandise and I signed for it. I don't care if it is a parcel of monkeys. I just sign.

Q Who did you pick it up for?

A I don't remember. You mean who did I pick it up for?

THE COURT: Yes, that was the question.

THE WITNESS: Well, I worked for or I was working for Joe Vetree and he gives me my orders for the day.

Q Who is Joe Vetree?

A My uncle.

Q What business is Joe Vetree in?

A Cosmetic business, I believe, or beauty aides.

Q Is he the owner of the Rand Distributors?

MR. SHARGEL: Objection.

THE COURT: No, I'll permit that.

A As far as I know, he is.

Q Was he the owner of Andor Distributors?

A Yes.

Q Are these the companies you work for?

A No. Andor.

Q You work for Andor?

A Right.

Q What business is your brother in?

A I really couldn't tell you.

Q Dennis D'Amato, what business is he in?

A I really couldn't tell you. You know, we don't talk about business.

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Q What does Dennis D'Amato do for a living?

A I don't know.

Q Dennis D'Amato, does he buy and sell merchandise for Joseph Vetree?

MR. SHARGEL: Objection.

THE COURT: No. I will permit it.

A He buys from Joe Vetree. I don't know about selling.

Q Did Dennis D'Amato have his place of business with Joseph Vetree often?

MR. SHARGEL: Objection.

THE COURT: Sustained as to form.

Q Did you work at Mr. Vetree's place of business?

A Not all the time. I was on the road making deliveries and pick-ups.

Q When you were at Mr. Vetree's place of business did you ever see Dennis D'Amato there?

A Maybe once out of a week, just before closing time.

Q Did you ever deliver Ultra Sheen to anyone at the request of your brother Dennis D'Amato?

A Yes.

Q To whom was that?

A Jano Distributors, I think.

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Q And who owns Jano Distributors?

A All I know is by his first name, Jules.

Q Where is Jano Distributors located?

A (No response.)

Q What town?

A Which one, his house or--

Q His place of business.

A I don't know. I think it is in Bayshore.

Q Is it Deer Park?

A Or somewhere near the border.

MR. WILSON: No further questions.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Mr. D'Amato, isn't it a fact that--you testified that you knew Mr. Donovan, right?

A (No response.)

Q Isn't it a fact that you first met Mr. Donovan this year?

A Yes, it is.

Q And wasn't that just casually?

A Right. Just passing by, really--

Q And you just saw him in the area of this Emerald Cosmetics?

A Right.

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Q I show you Defendant's Exhibit C for identification and I ask whether or not you know that man?

A Yes, I do.

Q Would you tell me that man's name?

A John Milano.

Q Maloney?

A Maloney.

THE COURT: Which is it?

THE WITNESS: John Maloney.

Q In March, March 27 of '72, did you own a truck?

A I don't own any trucks.

Q Do you know whether or not you rented a truck with that, or had a truck with that license number?

A I really don't remember. I just drive a truck and whatever it is it is.

Q Have you ever rented a truck, Mr. D'Amato?

A Me, personally?

Q Yes.

A I did it once under instructions.

Q When was that?

A I really couldn't tell you.

Q Was that under instructions from John Maloney?

A I think it was.

Q Has John Maloney ever signed your name?

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A Not that I know of.

Q May I ask you to sign your name for me, please? Sign it Bob D'Amato.

A (Witness marks.)

MR. O'BRIEN: I have no other questions, your Honor.

THE COURT: Will you mark that as an exhibit?

MR. O'BRIEN: No, your Honor.

THE COURT: It ought to be marked, shouldn't it, for identification if not for anything else?

MR. O'BRIEN: Yes, your Honor.

THE COURT: If you want to have it marked as a court exhibit that's perfectly all right too.

MR. O'BRIEN: No, as a defendant's exhibit it would be fine too.

(Defendant Donovan's Exhibit D was marked for identification.)

CROSS-EXAMINATION

BY MR. SHARGEL:

MR. O'BRIEN: Your Honor, I will offer this into evidence.

THE COURT: Any objection?

MR. WILSON: No objection.

THE COURT: Mr. Shargel?

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MR. SHARGEL: No objection.

THE COURT: Received in evidence.

(Defendant Donovan's Exhibit D for identification was received in evidence.)

BY MR. SHARGEL:

Q Mr. D'Amato, how old are you?

A 28.

Q You are not wearing a toupee, are you?

A No.

Q Did there ever come a time when you testified before a Federal Grand Jury in relation to this matter?

A Repeat that again?

Q Did there ever come a time when you testified before a Federal Grand Jury in this building with relation to this matter?

A Yes.

Q You did?

A Yes.

MR. SHARGEL: Now, I demand that the appropriate materials be turned over to defense counsel.

MR. WILSON: They are on the counsel table.

THE COURT: We will have a short recess.

(The jury left the courtroom.)

THE COURT: Mr. Shargel, I just wanted to inform

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you that that's the very reason for the court's admonition in United States against Jardin, I believe it is, that that demand not be made in the presence of the jury.

I know that Mr. Wilson turned them over to you while the witness was testifying. All you had to do was request a recess at the conclusion of that witness' testimony and I would have done what was required to be done and these procedures are going to be followed in this court.

All right, we will have a recess while you read them and when you are ready, let me know.

(Recess.)

ROBERT D'AMATO, resumed.

CROSS-EXAMINATION

BY MR. SHARGEL:

Q Mr. D'Amato, you told us you worked for Andor Distributors.

A Right.

Q How long have you been employed there?

A About a year and-a-half.

Q Describe, if you will, to the court and jury, the products that Andor Distributors deals with.

A Well, health and beauty aids. hair sprays, tooth past, hair tonics--that's about it, you know.

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Q Sundry items sold in drug stores?

A Basically, yes.

Q Items which we commonly find in drug stores and discount drug stores, is that right?

A Right.

Q Do these items number in the thousands, if you know?

A I don't know.

Q Now, you testified, I believe, that Joe Vetree was your boss at Andor Distributors?

A Yes, he is.

Q Joe Vetree, as a matter of fact is your uncle.

A Right.

Q Because you are related to Dennis D'Amato, he's Dennis' uncle too; is that not so?

A I guess so.

Q You told us on direct that you weren't sure or positive what your brother's business was.

A Right.

Q Isn't it a fact that your brother also sells drug sundries?

A Yes.

Q There is no question in your mind about that, is there?

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A None.

Q Isn't it a fact that your brother has his own truck?

A Yes.

Q Isn't it a fact that--by the way, when is the first time you ever met me?

A The first time?

Q Yes.

A This morning.

Q Did we sit down and discuss this case?

A No.

Q Isn't it a fact that your brother has his own customers?

A Yes, as far as I know, yes.

Q And as far as you know, your brother has his own deliveries and delivers his own merchandise?

A Right.

Q Do you know every place where your brother buys merchandise?

A No, I don't.

Q Do you work for your brother?

A No.

Q Did you ever work for your brother?

A No.

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Q So you don't know who all his customers are, do you?

A No, I don't.

Q You don't know where he buys his merchandise from, do you?

A No, I don't.

Q But he does buy some merchandise from Andor Distributors and Vetree?

A Yes.

Q And he has bought from Andor Distributors and Vetree on some occasions?

A As far as I know, yes.

Q Does Dennis work for Vetree?

A No.

Q Dennis is on his own, isn't he?

A Yes, he is.

Q Isn't it a fact that one of the reasons that Dennis buys from Andor is because it is his uncle and his uncle gives him a good deal?

MR. WILSON: Objection.

A Yes, it is.

THE COURT: Sustained.

Q How often, during the period of time that we are talking about, did your brother buy from Andor Distributors?

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A Like I said, I am on the road all day so I don't know if he calls in or--but I know I see him once a week so I guess he buys when I see him.

Q Do you know what he buys?

A Basically, hair sprays, some aspirin, Bayer Aspirin, Exedrin Aspirins--that kind of merchandise.

Q And these products--isn't it a fact that these products are then sold to retail drug stores?

A Yes, it is.

Q Do you know if Dennis D'Amato, your brother, ever sold any products to Joe Vetree at Andor?

A I really don't know.

Q Did you ever talk to your brother about this shipment that you testified to on direct?

A I think I mentioned it to him, something about that. I still don't remember who it is, where it is.

Q Did you testify that you didn't know what was in those cartons?

A Right.

Q Did you pick up those cartons at the direction of Dennis D'Amato?

A I don't take any orders from Dennis.

Q You picked up those cartons at the direction of your boss, Joe Vetree, isn't that right?

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A Right.

Q And that's what you told us on direct examination, isn't that right?

A Right.

Q Did you take those cartons, whatever they contained, to Dennis D'Amato's house?

A No.

Q Did you ever deliver them enywhere to Dennis D'Amato?

A No.

Q You testified on direct, Bob, that you once delivered some Ultra Sheen for your brother. Now, we have established that you don't work for your brother, isn't that right?

A Right.

Q Were there times that you did favors for your brother?

A Once.

Q Was the one time that you did a favor for your brother the time that the Ultra Sheen was delivered?

A Yes, it is.

Q Can you tell us now the circumstances under which you did that favor for your brother?

A (No response.)

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Q Let me rephrase the question if I may.

Isn't it a fact that your brother was sick when he was supposed to deliver the Ultra Sheen?

A Yes, he was.

Q Isn't it a fact that your brother was in bed with a fever?

A Well, I know when I seen him he was sick and I gave him my car to go home with so he could go home and go to bed and I told him I will make the delivery for him, and that means I had no car for the night and I only had his truck.

Q And this is the favor you did for your brother?

A Yes, it is.

Q And this is the favor, when you delivered the Ultra Sheen to Jano Distributors?

A Right.

Q When you delivered the Ultra Sheen to Jano Distributor, tell the jury where you delivered it.

A I delivered it to his house.

Q What's the name of the man that owns Jano?

A Jules something or other. I don't know his last name.

Q Where does he live, if you remember?

A He lives in Plainview off Jano Place, I guess;

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I don't know.

Q Bob, if you remember, how big was that shipment? I don't mean in terms of eight ounce jars or cartons but was it a large shipment?

A No.

Q Isn't it a fact that the Ultra Sheen was put into Mr. Jano's--I can't remember his name--garage?

A Yes, it was, I think.

Q You were in the business of delivering drug sundries. Did you think it was so unusual that you delivered it to the man's house?

MR. WILSON: Objection.

MR. SHARGEL: I submit I laid a foundation, your Honor.

THE COURT: Rephrase the question.

Q Did you think it was unusual?

MR. WILSON: It is argument, your Honor.

THE COURT: Rephrase the question.

Q Had you ever delivered any products to a man's house before?

A No.

Q Did you think there was anything unusual about that particular delivery?

A No.

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Q Just another favor for your brother?

MR. WILSON: Objection, your honor.

THE COURT: Sustained.

MR. SHARGEL: I have no further questions.

THE COURT: All right. Any redirect?

MR. WILSON: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. WILSON:

Q Do you recall where you took the jar-caps that you picked up from Jones Motor Freight?

A I told you before, I don't know what I picked up.

Q Where have you seen Mr. Donovan before?

A At Emerald Cosmetics.

Q What is Emerald Cosmetics?

A What is Emerald Cosmetics? As far as I know, they just sell me Miss Clairol for my orders to be delivered.

Q Who are they selling the Clairol to; what company?

A To Andor Distributors.

Q And what does Mr. Donovan do at that place?

A I don't know.

Q How often had you seen him there?

A I only met him this year so maybe I seen him twice.

MR. WILSON: No further questions.

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THE COURT: Anything further, gentlemen?

MR. SHARGEL: Nothing further, Judge.

THE COURT: All right, you may step down.

Next witness.

(Witness excused.)

MR. WILSON: The government calls Ernest Bodeck.

Your Honor, may I approach the side bar with counsel?

(At the side bar.)

MR. WILSON: Because of the religious convictions of the witness he would like to take an affirmation.

MR. O'BRIEN: No problem, no problem.

THE COURT: All right.

(In open court.)

ERNEST BODEK, called as a witness by the government, affirmed and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Bodek, what do you do for a living?

A I am a wholesaler of health and beauty aids.

Q And what is the name of your company?

A Victoria Sales.

Q Did you ever hear of a product called Ultra Sheen?

A Yes.

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Q And on how many occasions have you purchased Ultra Sheen?

A One time.

MR. WILSON: May I have these documents marked Government's Exhibits 25, 26 and 27?

(Government's Exhibits 25,26 and 27 were marked for identification.)

THE COURT: If you want to show them to counsel, I don't know, why don't you have them take a look at it and maybe we can save some time.

(Pause.)

THE COURT: I'm just trying to see whether or not there is going to be an objection to them or are they going to go into evidence or what? That's all I want to find out.

Q Mr. Bodek, I show you Government's Exhibit 25 for identification.

Can you tell us what that is?

A This is an invoice that we have received for the products of Ultra Sheen.

Q From whom did you receive it?

A Dennis D'Amato.

MR. WILSON: The government offers it in evidence.

MR. O'BRIEN: I object on the ground it is not binding on my client.

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MR. SHARGEL: I have no objection.

THE COURT: All right. They couldn't hear your last answer.

(Record read.)

Q Mr. Bodek, I show you Government's Exhibit 26 for identification.

Can you tell us what that is?

A This is a check what we paid for the products.

Q What is the amount of that check?

A $6,612.

MR. WILSON: The government offers it into evidence.

THE COURT: Show it to counsel.

MR. O'BRIEN: Same objection, your Honor.

THE COURT: Is this being offered against both defendants?

MR. WILSON: It is being offered as part of the charge in the indictment, your Honor, against both defendants.

THE COURT: It is received subject to connection.

There is no objection by Dennis D'Amato as I understand it, is that right?

MR. SHARGEL: No objection.

THE COURT: All right.

MR. WILSON: No objection to 26?

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MR. SHARGEL: No objection.

THE COURT: All right.

(Government's Exhibit 26 for identification was received in evidence.)

(Government's Exhibit 25 for identification was received in evidence.)

Q Mr. Bodek, I show you a carton that has been marked as Government's Exhibit 8 for identification.

Can you identify that?

A This is the merchandise what we sold and this the company from and to Francine & Co., Inc.

Q Can you speak louder, Mr. Bodek?

A Yes.

Q Say it again.

A This is the merchandise what we sold to a company, Francine & Co., Hialeah, Florida.

Q Hialeah, Florida?

A That's right.

Q And I show you what has been marked as Government's Exhibit 27 for identification.

Can you tell us what that is?

MR. SHARGEL: Perhaps we can save time. I will stipulate that this is what Dennis D'Amato sold him.

MR. WILSON: Well, your Honor, I've got to prove

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these things. Counsel had an opportunity, prior to trial, to--

THE COURT: Don't argue, please. No argument. If you want to prove them, go ahead and prove them.

You have no objection to Exhibit 8 going into evidence?

MR. O'BRIEN: Your Honor, I have the same objection that I had before.

THE COURT: Yes.

MR. SHARGEL: And I have no objection.

THE COURT: All right. Exhibit 8 will be received in evidence.

(Government's Exhibit 8 for identification was received in evidence.)

Q Just tell us, briefly, what that exhibit is that you are holding.

A This is what we invoiced for the company, Francine, for 200,000 Ultra Sheen.

MR. WILSON: Thank you, Mr. Bodek.

I have no further questions.

THE COURT: This is on Exhibit 27?

MR. WILSON: Yes, your Honor.

THE COURT: All right.

MR. O'BRIEN: Same objection.

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THE COURT: All right. Same ruling.

(Government's Exhibit 27 for identification was received in evidence.)

THE COURT: Do we need a recess?

MR. O'BRIEN: No, your Honor.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q You don't know Mr. Donovan, do you, Mr. Bodek?

A No.

MR. O'BRIEN: No further questions.

MR. SHARGEL: Just a few questions, your Honor.

CROSS-EXAMINATION

BY MR. SHARGEL:

Q Mr. Bodek, you are a distributor or wholesaler in drug supplies?

A Health and beauty aids.

Q That doesn't include pharmaceuticals or prescriptions, prescription drugs, or anything like that?

A No.

Q These are the sundries and sundry aids that we see on the shelves of drug stores?

A Yes.

Q Shaving creams?

A Anything whatever.

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Q Does that include Excedrin, and Bufferin, and things like that?

A It includes anything.

Q Anything?

A Anything.

Q You are in the business, sir, of buying and selling these items?

A Right.

Q Do you sell to retail stores?

A Yes.

Q Do you sell to other jobbers on occasion?

A On occasion.

Q Sir, are you in the business which is commonly known as the discount drug trade?

A (No response.)

Q Do you understand my question?

A No. Please repeat it.

Q Are the items that you deal with and the items that you sell discounted items?

A Could you please explain?

Q By discount, sir, I mean not sold at the suggested retail price but sold at a lesser price, a competitive price.

A I buy and I sell. I don't understand. I

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would like to answer but I don't understand your question.

Q I appreciate that.

A I don't understand your question. I buy and if the price is good to be sold, I sell.

Q When you buy, you look for the best price?

A I try to get, if I call up a customer and I tell him this is what I have, this is the product, and this is my price, and I put it at 5%, 2%, or whatever it is, and I sell.

Q Is it fair to say that when you buy merchandise, you look to buy at the best price you can obtain the merchandise?

A If I look, I mean, you could only buy at one price what you could get.

I don't understand your question.

Q Do prices vary with these items?

A What means "vary"?

My English is not good. I know to speak but I don't know each word. If I may say one word--

THE COURT: No. That's all right.

THE WITNESS: I have my wife here. She knows Jewish. I don't understand each word what you mean.

THE COURT: All right. Look, no one is finding fault with you, and don't be embarrassed about it.

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THE WITNESS: I don't know where I am.

THE COURT: Just listen to the question and answer it as best you can. Don't be embarrassed about it; not at all.

Q Sir, I will speak as slowly as you wish. If you don't understand, just please ask me again.

You sell many products?

A Yes.

Q And you buy these products from many different people?

A Right.

Q Is it not true that one product may be obtained from different people at different times?

Do you understand that question?

A What means "obtained"?

Q Bought.

A Bought?

Q Bought. One product can be bought from many different people at different times.

MR. WILSON: Your Honor, I am going to object to this whole line.

THE COURT: No. I will permit it.

A If one product--

MR. SHARGEL: May I try again?

THE COURT: Yes. And I think you can do better with it too. You can, really.

MR. WILSON: I am sure that I would stipulate to it, your Honor.

MR. SHARGEL: Let me try once more.

THE COURT: Please, gentlemen. Any remarks are to be addressed to the court and not to other counsel.

All right. Proceed.

Q You deal, sir, in a particular hair spray, for example.

A Right.

Q Can you name one hair spray product that you sell, sir?

BY THE COURT:

Q Do you sell Clairol?

A No. I only sell when I have.

Q Do you buy Clairol?

A I buy only merchandise--

Q When you buy Clairol, do you go to different people to buy it from at the best price you can get it?

A If I want the product I am looking for--

Q Who do you call?

A Who I know in the line.

Q You call the suppliers who you know in the line?

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A Yes.

Q Do you call several different ones to see if you can get a better price from one than you can from another?

A Yes.

THE COURT: All right.

MR. SHARGEL: Thank you, Judge.

THE COURT: All right. I'm not supposed to practice law, you see.

MR. SHARGEL: Thank you, Judge.

BY MR. SHARGEL:

Q When you buy a product, it is not always from the person who manufactures the product; isn't that right?

A Right.

Q It is from a jobber or a wholesaler?

A Right.

Q When you bought this Ultra Sheen, did you think something was wrong with it?

A No.

Q You didn't think it was stolen, or anything, did you?

A No.

MR. SHARGEL: I have no further questions.

THE COURT: All right. Anything further, Mr.

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Wilson?

MR. WILSON: Nothing, your Honor.

THE COURT: Thank you, very much. You may step down.

(Witness excused.)

MR. WILSON: Your Honor, may I have a moment with counsel?

THE COURT: Yes, you may.

(Pause.)

MR. WILSON: The government calls Jerry Herman.

GERALD HERMAN, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

THE COURT: Before you begin your direct, Mr. Wilson, ladies and gentlemen, in connection with the questioning of the witness by the court, I have the right and the obligation--I suppose I am not just to sit here and rule on objections, but if necessary, it is to bring out anything that may be pertinent. I don't usually interfere where we have competent counsel, as we have in this case, in the interrogation of witnesses, and you are not to infer by my asking questions, or anything else, that I have any opinion one way or the other about any of the fact matters

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in this case.

All right. Proceed.

BY MR. WILSON:

Q Mr. Herman, who do you work for?

A Interstate Cigar Company.

Q How long have you worked for them?

A Over ten years.

Q And what is your present position with them?

A Buyer.

Q Do you have any other title?

A Yes.

Q What is your title?

A Vice President.

Q Are you in charge of anything there?

A Buying, and processing of bills, and purchasing.

Q What does Interstate Cigar Company do?

A Buy and sell health and beauty aids, wholesale health and beauty aids.

Q Are you familiar with a product called Ultra Sheen?

A Yes.

MR. WILSON: May I have this marked as Government's Exhibit 28 for identification.

(Government's Exhibit 28 was marked for

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identification.)

Q Mr. Herman, can you identify Government's Exhibit 28 for identification?

A Yes.

Q What is it?

A It's an invoice from Jomar Distributors to us, Interstate Cigar Company.

Q For what?

A Ultra Sheen, 204 dozen Ultra Sheen, 8 ounces.

MR. WILSON: The government offers it in evidence.

MR. SHARGEL: I just want to look at it. I don't think I have an objection to it.

MR. O'BRIEN: Your Honor, I have the same objection as before.

THE COURT: All right. Very well.

MR. SHARGEL: I certainly have no objection to it.

MR. WILSON: I offer it in evidence.

(Government's Exhibit 28 for identification was received in evidence.)

MR. WILSON: May I have this marked as Government's Exhibit 29 for identification.

(Government's Exhibit 29 was marked for identification.)

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Q Mr. Herman, I show you Government's Exhibit 29 for identification; can you tell the jury what that is?

A That is a bill from Interstate Cigar Company to Baum & Company in Cleveland, Ohio.

Q Did that document contain any Ultra Sheen? Was there a shipment of Ultra Sheen there?

A Yes.

Q How much was there?

A 120 dozen.

MR. WILSON: The government offers it in evidence.

MR. O'BRIEN: Same objection, your Honor.

MR. SHARGEL: May I see it?

(Pause.)

MR. SHARGEL: On behalf of Dennis D'Amato, no objection.

THE COURT: All right.

(Government's Exhibit 29 for identification was received in evidence.)

Q Mr. Herman, prior to coming on the stand this morning, did you examine Government's Exhibit 29 to determine the number of items that would have been shipped in that order?

A You mean cases?

Q Yes.

A Yes.

Q What was this number?

A 135.

Q I show you Government's Exhibit 9 for identification and I ask you if you can identify this carton as the carton shipped to Baum & Company.

A It looks like it might have been on that shipment; yes.

Q Is there a stenciled notation "Baum & Company" and "135" on that?

A Yes.

Q And is it the practice of your company to put its name, the name of the person who is going to receive a shipment on the container?

A Yes.

Q And is it also the practice to put on the container the total number of items in that shipment?

A Cases, you mean?

Q Yes.

A Yes.

Q Does that say "Baum & Company, 135"?

A Yes.

MR. WILSON: The government offers 9 for identification in evidence.

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MR. SHARGEL: No objection.

MR. O'BRIEN: Same objection.

THE COURT: All right. It will be received.

(Government's Exhibit 9 for identification was received in evidence.)

Q Have you checked the records of your company, Mr.Herman, to determine whether you purchased Ultra Sheen in the course of 1972 from anyone other than Jomar Distributors?

MR. SHARGEL: Objection.

THE COURT: Yes. Rephrase your question.

Q Are you familiar with the manner in which the records of your company are kept?

A Yes.

Q Are you able to determine whether a particular product has been sold in the course of the year by checking your records?

A Yes.

Q Have you done so in connection with this matter of Ultra Sheen during the year 1972?

A Yes.

Q How many persons did you purchase Ultra Sheen from during 1972?

MR. SHARGEL: Objection.

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THE COURT: No. I will permit it.

A To the best of my knowledge, one.

MR. WILSON: May I have this marked as Government's Exhibit 30 for identification.

(Marked Government's Exhibit 30 for identification.)

Q Does Interstate Cigar Company have a manner of using an IBM computer to determine the products it has sold?

A Yes.

Q And at my request, have you had an IBM run made on the product Ultra Sheen for the year 1972?

A Yes.

Q I show you Government's Exhibit 30 and I ask you if this is it.

A This is it.

MR. WILSON: The government offers it in evidence.

THE COURT: Counsel?

MR. SHARGEL: I should like to see it, your Honor.

MR. O'BRIEN: Your Honor, I have the same objection. May I have a continuing objection to these, your Honor?

THE COURT: No. I have no objection to your objecting each time.

MR. SHARGEL: No objection.

THE COURT: All right. It will be received in

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evidence.

(Government's Exhibit 30 for identification was received in evidence.)

Q How many dozen Ultra Sheen were sold by your company in the course of 1972?

A 204 dozen.

Q And how many cases of Ultra Sheen did you purchase from Jomar Distributors?

A 204 dozen.

MR. WILSON: No further questions.

MR. O'BRIEN: No questions, your Honor.

THE COURT: Mr. Shargel?

CROSS-EXAMINATION

BY MR. SHARGEL:

Q Mr. Herman, how long have you been with International Cigar?

A Over ten years. Approximately since 1959.

Q Will you speak up a little louder?

A Over ten years.

Q Despite the name Interstate Cigar, obviously it deals in more than cigars?

A Mostly health and beauty aids.

Q Are these health and beauty aids generally sold to discount distributors, discount establishments?

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A Pardon?

Q To discount establishments; discount drug stores.

A Drug stores and grocery and supermarket chains, drug chains, wholesalers.

Q How many different products are sold by Interstate Cigar?

A Thousands. I would say probably in the course of a year, we probably would handle as many as 5 to 10,000 different products, you know, with the product sizes and different types of products; yes.

Q And these different products and different types of products are sold to retail establishments?

A Chains, mostly chains, wholesalers, drug chains, supermarket chains.

Q So you are testifying that they sold not only to retailers but also to wholesalers?

A Right.

Q Now, when you obtain or buy products which you will, in turn, sell, do you always buy them from the manufacturer of the products?

A Not always. Most of the time, but not always.

Q There are many numbers of occasions when you do not buy; is that your testimony?

A Yes.

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MR. WILSON: Objection.

A Many times we don't buy direct from the manufacturer.

Q So it wasn't unusual that Ultra Sheen was bought from a company like Jomar Distributors?

A Not unusual, no.

Q Isn't it a fact that one particular product, such as Excedrin, may be bought from many different distributors?

MR. WILSON: I'm going to object to that.

THE COURT: Sustained.

Q Is it customary in your business that one wholesaler is the source of one product?

A No. You mean the only source of the product?

Q That's right.

A No, it's not customary. We would only buy from one wholesaler.

Q Isn't it a fact that when you buy these products you look for the best price?

A Yes.

Q So that in turn you may sell to your customers at the best price?

A Yes.

Q And isn't is a fact that during the course of a

year a particular product may be bought from a variety of different places?

A Yes.

Q When you bought that Ultra Sheen from Jomar, did you think anything was wrong with it when it was delivered?

A No.

MR. SHARGEL: I have no further questions.

THE COURT: Any redirect?

MR. WILSON: None, your Honor.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Your next witness, please.

HERBERT DUNAYER, called as a witness by the government, being first duly sworn, testified as follows:

THE COURT: Mr. Dunayer, I just want to let you know that everybody in that jury box has got to hear what you have to say, so you listen to the questions of the attorney and you be certain that the jurors there can hear what you have to say, all right?

THE WITNESS: Fine.

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Dunayer, by whom are you employed?

A L.S. Amster & Company.

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Q What business is L.S. Amster & Company in?

A We are wholesalers in health and beauty aids.

Q What is your job there?

A I am the head buyer of the company.

Q Would you look at the people seated at this table here and tell me if you know anyone here?

A Yes.

Q Who do you know?

A Dennis D'Amato.

Q Are you familiar with the product called Ultra Sheen?

A Yes.

Q Who are your suppliers of Ultra Sheen?

A The suppliers of Ultra Sheen when? Now?

Q During the course of 1972.

A From Johnson Products, the manufacturer of the item, and from Dennis D'Amato.

Q And do you recall at what time of the year you purchased the Ultra Sheen from Dennis D'Amato?

A In June.

Q And during the course of July, 1972 did you sell Ultra Sheen to anyone?

A Yes; sure.

Q Who did you sell it to?

A I sold it to a lot of people. Anybody who wanted to buy it, I sold it to.

Q Was one of the places you sold it the Times Square Stores in Hempstead?

A Yes.

Q I show you what has been marked as Government's Exhibit 10 for identification; can you identify anything on that box?

A Well, the only thing I can identify that belongs to us is this TIM-139.

Q What does that mean?

A TIM is our symbol for Times Square Stores.

139 is the number of cases we sent there.

MR. WILSON: The government offers it in evidence as Government's Exhibit 10 for identification.

MR. O'BRIEN: Same objection.

MR. SHARGEL: No objection.

THE COURT: Received in evidence.

(Government's Exhibit 10 for identification was received in evidence.)

Q There is a number 139 on this box, Government's Exhibit 10.

A The TIM is our symbol for Times Square Stores, and the 139 is the number of cases we sent to Times Square

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Stores.

THE COURT: Very well.

MR. WILSON: No further questions.

MR. O'BRIEN: No questions, your Honor.

CROSS-EXAMINATION

BY MR. SHARGEL:

Q Mr. Dunayer, when you bought the Ultra Sheen from Dennis D'Amato, you didn't think you were doing anything wrong, did you?

A No.

Q When you sold it to all your customers in Times Square Stores, you didn't think you were doing anything wrong, did you?

A No.

MR. SHARGEL: I have no further questions.

THE COURT: Anything further?

(No response.)

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness, please.

MR. WILSON: Your Honor, may I step down to see who is there?

THE COURT: Surely.

(Pause.)

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MR. WILSON: The government calls Marilyn Renna.

MRAILYN RENNA, called as a witness by the government, being first duly sworn, testified as follows:

THE COURT: We have had witnesses in here, and universally witnesses don't like to speak up loud enough, but it is most important that everything you have to say be heard by everybody, and if you will focus a little bit from time to time on that last juror in the jury box, you will know whether he is hearing you or not, and I won't have to reprimand you about it, all right?

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MR. WILSON:

Q Who do you work for?

A Times Square Stores.

Q What is your position with them?

A I am a houseware manager.

Q In July and August of 1972, what was your position there?

A I was a drug and cosmetic manager.

Q And do you know a product called Ultra Sheen?

A Yes.

Q Did you have any responsibility with respect to the purchase of Ultra Sheen?

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A I was responsible to order the merchandise in the store.

Q Did there come a time in July of 1972 when you removed certain Ultra Sheen from your shelves?

A That's correct.

Q Did you seal a box at that time and put it on the side?

A Yes, I did.

Q Can you tell if that's the box?

A This is the box.

MR. WILSON: No further questions.

MR. O'BRIEN: I have no questions.

MR. SHARGEL: No questions.

THE COURT: All right. That's all. You are excused, Miss.

(Witness excused.)

THE COURT: Next witness, please.

MR. WILSON: Your Honor, at this time the government would like to offer the affidavit pursuant to stipulation.

THE COURT: Very well,

MR. WILSON: Ladies and Gentlemen, there has been a stipulation reached by counsel that a lawsuit against Dennis D'Amato and several others not including

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Robert Donovan, was brought in July of 1972 in the United States District Court for the Eastern District of New York.

THE COURT: Ladies and Gentlemen, a stipulation is an agreement between counsel as to certain facts, or whatever is contained therein, or that if a certain witness were called, that witness would testify to them, and it takes the place of live testimony, or testimony from a witness, and it is the same as any other evidence that goes in here. All right.

MR. WILSON: Thank you, your Honor.

That lawsuit was brought by the manufacturer of Ultra Sheen, Johnson Products, Inc., seeking monetary damages and an injunction, and Government's Exhibit 23 for identification is an affidavit sworn to by the defendant Dennis D'Amato and filed with the court in that case.

With that stipulation, the government will offer 23 for identification in evidence.

MR. O'BRIEN: Same objection.

MR. SHARGEL: I have no objection.

THE COURT: All right. It will be received in evidence.

(Government's Exhibit 23 for identification was received in evidence.)

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MR. WILSON: Your Honor,with that stipulation, I would like to read the exhibit.

THE COURT: Very well.

MR. WILSON: It is an affidavit, ladies and gentlemen.

It says, Dennis D'Amato, being duly sworn"--

THE COURT: May I do this: This relates solely, members of the jury, to Count 3 of the indictment which, as I have informed you before, relates solely to Mr.D'Amato. It has no bearing whatsoever, in so far as Counts 1 and 2 are concerned, to Mr. Donovan, and it is not to be considered in any way in so far as Mr. Donovan is concerned.

It is offered solely for Count 3, which is against Mr. D'Amato.

Is that satisfactory as an instruction, ladies and gentlemen?

(All nodded in the affirmative.)

THE COURT: And counsel?

MR. SHARGEL: Judge, may we have the whole affidavit read from the beginning?

MR. WILSON: I am going to do it from the beginning, your Honor.

THE COURT: He wants the entire thing read in.

(Mr. Wilson read the affidavit to the jury.)

MR. WILSON: That is the end of the affidavit, ladies and gentlemen.

Your Honor, if I may have one minute.

(Pause.)

MR. WILSON: Your Honor, I believe that you have another copy of this which has some additional material on it. You were looking at it before. It has some exhibits that are attached to it.

THE COURT: I have it here. This is Exhibit 23. This has been marked already as 23. I'm sorry.

MR. WILSON: I would like to offer 23, this version of 23, in evidence. It is identical to the one I read.

MR. SHARGEL: No objection.

THE COURT: All right.

(Government's Exhibit 23 for identification was received in evidence.)

MR. WILSON: Attached to this 23, ladies and gentlemen, are certain exhibits.

Your Honor, I would like to just direct the jury's attention to one of them. That is the one that is on the letterhead of Balzac Trading.

MR. SHARGEL: I object to this, your Honor. This is in evidence now.

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THE COURT: Well, he may read all of it or parts of it.

If you want to read the rest of it, you may.

MR. SHARGEL: I would prefer that he just pass it around to the jury.

THE COURT: No. If he wants to do it this way, he may. It is in evidence.

I will inform the jury that after the case is submitted to you and if you want to see any of the exhibits or have any of the testimony read, or my charge read to you, you are entitled to have those too.

MR. WILSON: This exhibit, Exhibit 1 to the affidavit, is on the letterhead of Balzac Trading, Sundries, Toiletries and Cosmetics, 348 East 27th Street, New York 10016, and it has a telephone number YU.6-3270, and it says, "Sold to Metro Shops Supply Company, 980 dozen Ultra Sheen."

Your Honor, may I see what witnesses I have in the witness room?

THE COURT: Yes. If you've got a witness who will only take about 10 or 15 minutes, we will try and do that before our luncheon recess.

(Pause.)

MR. WILSON: Your Honor, I have no witnesses for

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the moment.

THE COURT: All right. Will you gentlemen step up here for a moment?

(At the sidebar.)

THE COURT: How much longer are you going to take, Mr. Wilson?

MR. WILSON: I will have four more witnesses, your Honor. One would be from the telephone company to say that that number does not belong to Balzac Trading, one will be the postal carrier on that route to tell you that there is no such address as that.

I will then call a man from Carr-Lowery in Baltimore who will identify those jars, and I believe I will then call George Zimmer.

THE COURT: One of these jurors has sent me a note indicating that tonight commences Hannukah and would like to get out of here no later than 4:30.

I was just wondering whether we can get summations in tonight.

MR. O'BRIEN: Your Honor, I may call the government expert to testify regarding the handwriting. I would like to speak to him before I do that.

THE COURT: All right.

MR. SHARGEL: This might be an appropriate time

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with regard to these two witnesses--well, if we are going to break for lunch, we can do it then.

MR. WILSON: I can read some of the stipulations to the jury.

THE COURT: Why not do it now? Let's go for another ten minutes anyway.

MR. WILSON: All right, your Honor.

(In open court.)

MR. WILSON: If I might just have one moment, your Honor.

THE COURT: Yes.

(Pause.)

MR. WILSON: Ladies and Gentlemen, we have other stipulations that counsel have agreed upon to avoid calling witnesses.

The first one is, if called as a witness, Marlene Berry, an inspector with the United States Postal Service, would testify that she received the jars of Ultra Sheen marked Government's Exhibits 3 and 4 at the offices of Johnson Products, Inc., in Chicago, Illinois.

With that stipulation, your Honor, the government offers into evidence 3 and 4 for identification.

THE COURT: Any objection?

MR. O'BRIEN: No objection.

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THE COURT: All right. 3 and 4 are received in evidence.

(Government's Exhibits 3 and 4 for identification were received in evidence.)

THE COURT: Will I be furnished with a copy of the stipulations that you have entered into?

MR. WILSON: Yes, your Honor. They have been a little rough but I think in essence they will be all right.

The next stipulation, ladies and gentlemen, is, if called as a witness, Mrs. Ruth Baum, an officer of Baum & Company, a wholesale distributor of cosmetic and drug products, would testify that the company obtained the case of Ultra Sheen marked as Government's Exhibit 9 in a sealed condition in the Interstate Cigar Corporation and that she turned over that sealed case of Ultra Sheen to Inspector Gene McHale of the United States Postal Service.

Government's Exhibit 29 is the invoice from Interstate Cigar for this case of Ultra Sheen.

The third stipulation is that if called as a witness, Mr. Kenneth Byrne, an officer of the Francine Company, a wholesale distributor of cosmetic and drug products, would testify that the company obtained the

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case of Ultra Sheen marked as Government's Exhibit 8 in a sealed condition from the Victoria Sales Corporation and that he turned over that sealed case of Ultra Sheen to Inspector Gene McHale of the United States Postal Service.

Government's Exhibit 27 is the invoice from Victoria Sales Corporation for the case of Ultra Sheen.

If called as a witness, Richard Wasserberg would testify that he is a vice president of Crown Glass Company, a distributor of glass products in Chicago, Illinois, and that Johnson Products, Inc., the manufacturers of Ultra Sheen conditioner and hair dresser, is a customer of Crown Glass.

Government's Exhibits 3 and 4 are jars which Crown Glass supplies to Johnson Products.

Crown Glass is the only supplier to Johnson Products of this type of 8-ounce jar.

Each of these jars contains on the bottom side our customer code number, a 10-1. Each of these jars has been labeled through processing by which the paint is fused onto the glass jar and thus cannot be removed from the jar.

This is done by putting the glass jar into a decorating oven which reaches temperatures of 11 to 1200

degrees Fahrenheit.

I have examined the jars marked as Government's Exhibits 5, 6 and 7, and all of the jars in the case marked Government's Exhibits 8, 9 and 10. None of these jars are the same as those which we supplied to Johnson Products.

Crown Glass has not used any jars made by the Carr-Lowery Glass Company. Therefore, there are several ways in which the jars are different. There is no 10-1 identification number. There is a locating notch area on the bottom of the jar which is not found on our jars. The cavity number on these jars is not in the same position as that found on our jars.

The labeling on these jars is very different. It has been done by a cold color process in which the paint is applied to the jar and allowed to dry.

The paint applied in this process can be readily removed from the jar whereas the paint on the jars which we provide to Johnson Products cannot be removed.

Crown Glass Company has sold these identical jars but without the Ultra Sheen labeling painted onto them to no more than three other firms.

With that stipulation, your Honor, the government will offer what I think has not yet been offered, 5,

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6 and 7 into evidence.

THE COURT: Any objection?

MR. O'BRIEN: No objection.

MR. SHARGEL: No objection.

THE COURT: All right. 5, 6 and 7 will now be received in evidence.

(Government's Exhibits 5, 6 and 7 for identification were received in evidence.)

MR. WILSON: Your Honor, I think I cannot go any further right now, your Honor.

THE COURT: All right. Fine. I think this is an appropriate time. It is quarter of 1:00. I did receive a note before about the question I asked and Juror No. 4 indicated that he had been ordered to be home by 6:00 P.M. He would like to leave court between 4:00 and 4:30 if it is at all possible. We will make every effort to bring that about, and I anticipate that we will be able to accomplish what you wish. I expect that we will adjourn approximately around 4:30 this afternoon, which means that you will not receive the case for deliberation until tomorrow, but that's perfectly all right. I don't think we would be able to do it anyway, so I don't think it is going to interfere too much with our procedures.

We are going to recess now. It is quarter to

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1:00. You might get a little headstart on the 1:00 o'clock lunch rush. I expect you to be back here at approximately 5 minutes to 2:00. Do your best to be here.

Don't discuss the case. Don't make up your minds about it yet. You are not in a position to do that yet because you haven't heard all the testimony. Have a pleasant lunch.

(The jury left the courtroom.)

THE COURT: All right. Be back here promptly at 5 minutes to 2:00.

MR. O'BRIEN: Are we going to be asked to sum up this afternoon?

THE COURT: How long are you going to take? I don't know how many more witnesses we have. How long do you anticipate your summation will take now?

MR. O'BRIEN: Very honestly--

THE COURT: Well, I would expect that anyway. You don't have to make such a preface.

MR. O'BRIEN: Yes, your Honor. Just this side of an hour.

THE COURT: Mr. Shargel?

MR. SHARGEL: A half-hour.

THE COURT: Mr. Wilson?

MR. WILSON: No more than 45 minutes.

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THE COURT: Approximately two hours of summation. And how much testimony?

MR. WILSON: Well, we might be able to stipulate to two of the four witnesses I'm going to call. It should be at most a half-hour.

MR. O'BRIEN: Your Honor, I may have to call witnesses, one being the government expert.

THE COURT: If you call witnesses and we run awhile, we can't do it.

Now, I'm not going to restrict you as to time, but you may end up with defense summations this afternoon and summations by the government tomorrow morning.

MR. SHARGEL: I would object to that.

THE COURT: Your objections will be noted in the record, and I'm not putting any pressure on you at all whatsoever, but that won't be the first time that it's been done.

MR. O'BRIEN: I'm sure the Court of Appeals will affirm it, and there is no question about that at all.

THE COURT: I am not anticipating in any way or trying to put any pressure on you.

MR. O'BRIEN: I would ask your Honor very seriously that if we can't get all the summations in this afternoon, not to have any of them.

THE COURT: Well, then we will take up the whole morning tomorrow and we wouldn't get to the jury until before lunch, or we wouldn't get to them until after lunch, and then you run into the problem of deliberating late at night and--

MR. SHARGEL: Today the schedule was going to be--

THE COURT: Let's see where we go after 5 minutes to 2:00. There is no reason why you shouldn't be prepared to sum up in the event that you have to.

MR. SHARGEL: May I make a record on one thing?

I would object to the testimony which Mr. Wilson proffered at the sidebar, that being the testimony of the telephone company representative as to the fact that there is no such number for Balzac Trading, and (2), to the witness testifying to the effect that there is no such address.

There has been no evidence here that Balzac Trading Company was in any way in control of the defendant D'Amato. It was simply that he received, or that his affidavit stated that he received that document from Balzac Trading Company.

Now, Mr. Wilson wants to come in and discredit this piece of evidence--

THE COURT: Isn't it part of Count 3, the fact

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that the circumstance is that there isn't such a company but part of a false statement like that was made to the Grand Jury?

MR. SHARGEL: Not to the Grand Jury.

MR. WILSON: But to the court, in the affidavit.

THE COURT: The court at Eastern District.

MR. SHARGEL: But with regard to the bill there is no evidence that the defendant D'Amato falsified this. That's the difference.

MR. WILSON: The fact that is false is another fact that the jury can consider in determining whether this was all fictitious. The failure to prove that would be a matter which a juror could infer as giving some validity to the claim that there is a Balzac Trading.

THE COURT: I think it is admissible. I really do think it is admissible.

MR. SHARGEL: Well, based on your Honor's ruling--

THE COURT: But regardless of whether it is admissible or not shouldn't affect the ability to stipulate. I mean--

MR. SHARGEL: That's what I was getting into.

THE COURT: Regardless of whether, I mean, and I will reconsider it over the lunch recess, but you de-

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termine whether or not you want to stipulate it.

I told the jury that the stipulations are to the effect that if witnesses were called that they would testify to these things, not that they have to accept them as fact.

MR. SHARGEL: I would like to note for the record my exception to your Honor's ruling and I would--

THE COURT: I may change my ruling at 2:00 o'clock.

MR. WILSON: I think what Mr. Shargel is saying is that he won't require me to produce a witness if your Honor should rule that we can produce a witness. He is willing to forego the witness.

THE COURT: I didn't understand him to say that.

MR. WILSON: I think that's right.

THE COURT: I would have hoped that you would do that. We will take two of the four, and maybe I will sustain your objection, Mr. Shargel.

MR. WILSON: I would want to be heard on that before you did.

THE COURT: I know the problem, yes.

MR. WILSON: We still have the Government Exhibit number 22 which is the Ideal invoice.

I again would renew my offer of that document on the grounds that it has been identified properly as a

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record of the Ideal Decorating Corporation and, on the face of it, has a marked relationship to the issues in this case. It is Zimmer Associates; it is the same 408 cartons that Mr. Bausch testified that he delivered there.

THE COURT: I am still reserving on that. I am leaning towards the admissibility of it, really.

MR. O'BRIEN: Your Honor, at this point, I then would like to raise other points that are going to come up with regard to this.

Mr. Wilson and I have discussed this last night on the calling in a witness, well, with invoices that are close to this number. Chavis--

MR. WILSON: That's right.

MR. O'BRIEN: I understand that Mr. Wilson is in possession of certain information. He has not told me what that information is. That information may be Brady material, I understand.

MR. WILSON: I never said that.

MR. O'BRIEN: Well, I asked Mr. Wilson whether or not it was Brady material. He says it is arguable. I wouldn't quote Mr. Wilson. I'm saying that I feel--

THE COURT: He knows his obligations and he would hate to have a conviction here under 2255.

MR. WILSON: Or worse.

THE COURT: Or worse, yes.

MR. WILSON: It may be your Honor would make the first ruling on that.

THE COURT: Yes.

MR. WILSON: Your Honor, I have, after we left court yesterday, because of certain contacts I have, been able to have Mr. Bookbinder who runs that company go through all his invoices. He produced, late last night here, a certain quantity of them. He has gone back and produced some more at his place.

They are all over the lot, frankly. I think an argument could be made by Mr. O'Brien based on their availability.

I will produce Mr. Chavis and let him be called as a defense witness and I will have an opportunity to cross-examine him.

MR. O'BRIEN: And will Mr. Chavis also have the records here?

MR. WILSON: Right. And I will not object to whether he can identify them properly or not. They can go in.

THE COURT: Before 2:00 o'clock.

MR. WILSON: I hope we can do that.

MR. O'BRIEN: Yes, your Honor.

THE COURT: Anything else?

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(No response.)

THE COURT: This 3500 material really should be handed over long before but other judges have other ways of saying it, but you do it.

MR. WILSON: And most people who stand in my shoes will argue that the proper way to do it is the way your Honor has been doing it.

THE COURT: Well, there is no doubt that is the legal way of doing it and hopefully nobody is going to do anything illegal up here.

On the other hand, you have the question, really philosophically, about the failure, in an appropriate case, such where you have responsible counsel on the other side, of not turning over all the material. You have the omnibus hearings in other circuits where everything is laid bare and many times it leads to a just disposition of matters.

But we are not under that compulsion or directive in this circuit and, of course, I am going to follow what's required here.

(Adjourned to 1:55 o'clock p.m.)

AFTERNOON SESSION

2:00 o'clock p.m.

(Jury present.)

THE COURT: Proceed.

MR. WILSON: The government calls Mr. Edward E. Noel.

MR. EDWARD E. NOEL, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Noel, where are you from?

A Baltimore, Maryland.

Q For whom do you work?

A Carr-Lowery Glass Company.

Q How long have you worked for Carr-Lowery Glass Company?

A 27 years.

Q Have you been manager of the plant in Baltimore in the course of those 27 years?

A I was plant manager from January, 1970 until January, 1972.

Q What do you do now?

A I am sample liaison now.

Q What does that mean you do?

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A I am in with production of--regular production plus new design.

Q Are you familiar with the 8-ounce jar number 250 manufactured by the Carr-Lowery Glass Company?

A Yes, sir.

Q Before coming out on the stand this afternoon, have you been examining the jars which are in Government Exhibits 8, 9 and 10 in evidence as well as the jars that are marked as 5, 6 and 7?

A Yes, sir.

Q Who manufactured those jars?

A With the exception of two jars, Carr-Lowery manufactured them.

Q Those two jars are--are those two jars Government Exhibits 3 and 4?

A Yes, sir.

Q What is the basic difference between Government Exhibits 3 and 4 and 5, 6 and 7 that caused you to identify them?

A The basic difference is in the bottom, the bottom of the jars, plus the identification marks.

We have a mold number in the center of the jar. We have a ramp on the bottom. We have sort of a bevel, what we call a beveled-type push-up and larger bearing

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surface than the other jars.

Q Are the jars which you have identified as being from Carr-Lowery sold to anybody who wants to buy them?

A Yes, sir.

Q Are you familiar with the sales records kept at your company for those jars?

A In general.

(Government's Exhibit 31 was marked for identification.)

Q Do you know when this jar was first manufactured?

A 1969.

Q Can you tell us what Government's Exhibit 31 for identification is?

A This is a record kept in our sales department of the order numbers, the customers who order this jar and the date it was shipped.

Q Is that record kept in the regular course of the business of Carr-Lowery Glass Company?

A Yes.

Q Is it the regular course of business of Carr-Lowery Glass Company to make this record at or about the times reflected by the entries?

A Yes, sir.

MR. WILSON: The government offers it into evidence.

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MR. SHARGEL: My objection, if it please the court, is on the grounds of relevance to my client.

MR. O'BRIEN: No objection, your Honor.

THE COURT: Received in evidence.

(Government's Exhibit 31 was received in evidence.)

Q How many jars are in a gross?

A 144.

MR. WILSON: No further questions.

MR. O'BRIEN: Your Honor, may we have a recess?

THE COURT: Yes.

MR. WILSON: The reason for some of the recesses, your Honor, is not present now.

THE COURT: Will you accept that?

MR. O'BRIEN: Yes, your Honor, I will.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Would you show me the bottles that you say are manufactured by Carr-Lowery?

A This one, this one, this one.

Q These three are the same?

A Yes.

THE COURT: Which three are they, 5, 6 and 7?

MR. O'BRIEN: That's correct, your Honor.

Q Take a look at Exhibit 5. You said that the

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bottom of the bottle--

THE COURT: The jurors can't even hear you now, Mr. O'Brien. Speak up. It is all right for you to stay there for this purpose.

Q You said that from the bottom of the jar you could tell that it was manufactured by Carr-Lowery; is that correct?

A Yes.

Q Will you point out to me and show me what you were referring to when you indicated a number of points?

A We had a number in the circle in the center of the jar. This particular jar has no number in it. We have our mold or our cavities are numbered 1, 2, 3, 4, and so forth.

Q Just so I get you straight, you said that Carr-Lowery's cavity and number appears on their jars.

A In a circle.

THE COURT: Excuse me a minute. Do you have a red brush pen or something like that?

Q We are talking about this circle in the center?

A Yes.

Q You say that Carr-Lowery has that indentation and also a number there?

A Yes, sir.

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Q Is it fair to say that there is no number there in a circle?

A There is no number in that circle.

Q Will you tell me what else, on this jar, you have testified on direct, indicates to you that it is a Carr-Lowery jar?

A We have a beveled-type push-up. The push-up is deep and it has a bevel to it.

Q So we are indicating the side of this glass here where I have drawn some red marks on?

A Yes, sir.

Q You say that's beveled?

A Yes, sir.

Q Do you know if any other manufacturer of a similar type jar has the same type of bevel as appears here?

A They could.

Q So, other manufacturers could have that bevel?

A Yes.

Q Will you tell me what else on this jar indicates to you that it is a Carr-Lowery jar?

A We have a notch, a locating notch.

Q I will draw red, heavily, on what you indicated as the locating notch.

Will you tell us the purpose of a locating notch?

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A A locating notch is used when there is either a label applied for some screening, some decoration at the bottom of the jar.

Q Would it be a fair statement to say that a manufacturer who is going to have some sort of screening or wanted his jar available for screening would have to have a locating notch on that jar?

A Not necessarily that type.

Q But he would have to have a locating notch?

A He would have to have some type of locating notch or lug. It could be on the bottom or it could be on the side.

Q In your 27 years experience?

A Yes, sir.

Q Could you tell us how many manufacturers there are of this kind of a jar?

MR. WILSON: I object to the "kind of," your Honor. This is not a "kind of" a jar. This is a particular jar.

MR. SHARGEL: Mr. Wilson is testifying.

THE COURT: Proceed.

MR. O'BRIEN: I am referring to Exhibit Number 5 when I say "this kind of jar."

MR. WILSON: I object to the word "kind."

"A jar the exact duplicate of that," that is the question that should be put to the witness, or I object to it as being too general.

MR. O'BRIEN: I think I'd rather cross-examine.

THE COURT: Proceed.

Q Could you tell us how many other manufacturers there are of a jar similar to Exhibit Number 5?

A Not--there is a few that I know of similar to it. It would not be an exact duplicate.

Q Tell me how many manufacturers there are of an 8-ounce round jar?

A An 8-ounce round jar--

THE COURT: You have to go through the diameter and so forth. The same diameter?

THE WITNESS: This jar is what we call our stock jar. We sell this to anybody, now. Any other glass plant could make a jar similar to this.

Q How many other glass plants are there capable of making a jar similar to this?

MR. WILSON: Objection.

THE COURT: I will allow it.

A I don't really know.

Q Would it be 100?

A More than 100, I guess.

Q A thousand?

A Not a thousand, no. Between 1 and 500.

Q Have you ever inspected--

How many jars have you actually seen of other manufacturers? How many jars of other manufacturers have you actually seen?

A Two.

Q Could you then--well, you have only seen two of them?

A Right.

Q Is it a fair statement to say that you couldn't tell me whether or not those 1 to 500 other manufacturers would have a locating notch identical to yours?

A If they have a mold shop that could make the molds, they could have it.

Q There is no patent on this?

A There is no patent.

Q On this locating notch?

A No.

Q Would you tell us what else on this jar--

A Our bottom bear surface is a little bit wider because of the type of push-up that we have on it. That is where the jar sets on its base; this part is a little wider than the other two jars.

Q You are comparing this jar against this jar--

THE COURT: Would you refer to exhibit numbers?

Q You are comparing Exhibit Number 5 with Exhibit Number 4 and you are saying that your base is wider than their base?

A Bearing surface.

Q All right, the bearing surface is wider.

Is it a fair statement to say that other manufacturers, this 1 to 500 other manufacturers, could have a bearing surface identical to yours?

MR. WILSON: Objection.

THE COURT: No. I will permit it. You may answer.

A They could.

Q Is there anything also on this jar, then, that makes you believe that it is a Carr-Lowery jar?

A Just the things that I have pointed out. Mainly the mold number in the center.

Q It is mainly that?

A Yes.

Q There is nowhere on this jar, is there, your name?

A No.

Q Carr-Lowery?

A No.

MR. O'BRIEN: I have no other questions, your Honor.

MR. SHARGEL: I have no questions of this witness.

THE COURT: Any redirect?

MR. WILSON: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. WILSON:

Q You were visited in the last two weeks by a postal inspector in Baltimore, were you not?

A Yes.

Q And he showed you certain jars, did he not?

A Yes.

Q And you compared those jars to the actual sample from the mold that you retained?

MR. SHARGEL: I object to the form of the question.

Q What did you do when the postal inspector visited you with the jars?

A I compared the jars he showed me with one of our shelf samples of a job out of this mold.

Q You have already indicated certain items on the bottom which caused you to identify this as the exact jar that came from your mold. I show you--

MR. O'BRIEN: Your Honor, I object to leading and statements--

THE COURT: I think that's introductory to a question.

Q I show you another circle that I am marking with an "X".

Could you tell us what that is?

A Originally we had the mold number. Instead of being in the center it was off to the side. Since that time we moved it to the center and this other little circle here. Instead of making a whole new set of bottoms for this jar we simply ground off or drilled out the mold number in the circle and inserted a plug in here. The plug shows up in the final bottle.

MR. WILSON: No further questions.

THE COURT: Any further recross-examination?

RECROSS EXAMINATION

BY MR. O'BRIEN:

Q Do you make that same type of jar without a locating notch?

A We can, yes, sir.

Q If I placed an order asking for a jar without a locating notch, I could get one?

A Yes.

Q You don't know anyone in this courtroom, do you, other than--you don't know anyone at the defense counsel

table?

A No, Sir.

MR. O'BRIEN: That's all.

MR. WILSON: That's all.

(Witness excused.)

THE COURT: Next witness?

MR. WILSON: There are two stipulations that I would like to read now.

Again, to avoid calling the witness, if called as a witness, James Stafford, an employee of the New York Telephone Company, would testify that the telephone number 986-3270 and 986-3271 has been held by the Donald Zucker Company at 201 East 42nd Street in Manhattan since at least June 11, 1965.

That completes that stipulation.

If called as a witness, James Roy, an employee forthe United States Post Office Department, would testify that he is the route carrier of mail on East 27th Street and that at least since 19--at least for the past seven years there has been no such address as 348 East 27th Street.

That completes that stipulation, your Honor.

THE COURT: Again, members of the jury, I just want to repeat, these stipulations are entered not as proof of the facts but merely that if a witness were called,

that he would so testify. We do away with the necessity of calling the witness.

All right.

MR. WILSON: The government renews the admissibility of Government's Exhibit 22.

THE COURT: It will be received in evidence.

MR. WILSON: I'd like to show that to the jury, your Honor.

(Government's Exhibit 22 was received in evidence.)

MR. O'BRIEN: Your Honor, my prior objection--

THE COURT: Yes, yes.

MR. WILSON: I can't find that at this time, your Honor. I will just go on to another stipulation.

THE COURT: All right, it has been received in evidence.

MR. WILSON: If called as a witness, James Boyle, an inspector with the United States Post Office Department, would testify that he visited Metropolitan Avenue in Brooklyn, New York and could find no such address as 14 Metropolitan Avenue.

That completes that stipulation, your Honor.

Your Honor, may I have a moment with counsel?

THE COURT: Yes.

(Pause.)

(At the side bar.)

MR. SHARGEL: Your Honor, there is a stipulation with regard to the attorney who aided in the preparation and submitted the affidavit. Mr. Wilson is about to suggest that I am playing games with the stipulation. However, last night when this was gone over, it was gone over with Mr. O'Brien.

It was indicated to Mr. Wilson that we were not stipulating to this in this form. Therefore, Mr. Wilson should have known that, as of last night, there was no stipulation.

As of this morning, and it is now 2:30, there was no stipulation. Now, with the jury sitting in the box, he turns to me and says "We will stipulate or alter the stipulation."

I had every reason to expect that the witness would be here.

MR. WILSON: That's an outrage. Mr. O'Brien was told--told me yesterday that he, of course, would want some additional information with respect to the place that it was signed, and I am perfectly prepared to put in here where it was signed according to Mrs. Garland.

They are simply playing games with the government and the court.

THE COURT: Is she available?

MR. WILSON: I am sure she is available.

THE COURT: If we go over, we will have to go over.

MR. WILSON: Frankly, your Honor, the affidavit now in evidence bears the legend "Signed in the County of New York," and I suppose that, for purposes of venue, on the record before this court, that that document establishes there is venue on its face, and we would not even have to call Sylvia Garland, this witness.

It may not be an accurate portrayal of all the facts known to all the parties here, and therefore, I think the stipulation is a desirable thing, but the practical effect under the law is the same.

MR. O'BRIEN: Your Honor, I would like to just clear up the record.

THE COURT: Don't worry about that. Don't argue about it. Misunderstandings arise--

MR. O'BRIEN: There are additional facts that I asked Mr. Wilson to include in No. 7.

MR. WILSON: You have to give them to me. It is your client. What was his title and what were the jobs--I will take all that out. I don't need any of this. I will just put in that he has a BA in chemistry, O.K.?

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That's what you promised me a month-and-a-half ago.

MR. O'BRIEN: Mr. Wilson, you said you wanted this in. I said I would agree to the entire No. 7 as long as we added the sentence--

MR. WILSON: Give me the numbers.

MR. O'BRIEN: All right, I will give them to you. You don't hand this to me at counsel table with nothing in there.

THE COURT: We will have a recess.

(In open court.)

THE COURT: Members of the jury, we will just take a short recess.

(Recess.)

(In the courtroom. Jury present.)

MR. WILSON: There are some more stipulations, your Honor.

Ladies and Gentlemen, it is stipulated that the facts set forth in the affidavit, Government's Exhibit 23, were recited by Dennis D'Amato to his attorney in that civil case, to Sylvia Garland, in her office in Manhattan and that the affidavit was then prepared in her office in Manhattan, and that the affidavit was signed by Mr. D'Amato in Brooklyn.

That is the end of that stipulation, your Honor.

Finally, it is stipulated that Robert Donovan received a Bachelor of Arts degree with a major in Chemistry from Hofstra College in 1960; that he was employed at the Stauffer Chemical Company in San Francisco, California, as a sales representative from 1962 to some time in 1964; and that he was employed by the National Distillers and Chemical Corporation as a sales representative in the Chemical Division dealing with industrial alcohol and polyethylene from September 1, 1964 to July 1, 1966, and again, from August 18, 1969 to March 31, 1972.

Would you give us the end of that?

MR. O'BRIEN: And at National Distillers and Chemical Corporation they prohibited outside employment that would involve the disclosure of their trade secrets.

MR. WILSON: That completes the stipulations, your Honor.

The government calls George Zimmer.

GEORGE ZIMMER, called as a witness by the government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q Mr. Zimmer, what do you do for a living?

A I am a cabinetmaker.

Q Do you have your--

A Self-employed.

Q What's the name of your company?

A A-1 Woodworking.

Q How long have you been doing that?

A About eight years.

Q What is your home address?

A 163 West 19th Street.

Q Where is that?

A In Huntington Station.

Q In New York?

A Yes.

Q Would you tell the jury what your telephone number was during 1971?

A 271-0679.

Q Do you know or recognize any of the people seated at this table?

A No, I don't.

Q Did you ever utilize an answering service in Port Jefferson called the Port Jefferson Telephone Answering Service?

A No, I didn't.

Q Have you ever utilized an answering service anywhere?

A No, nowhere.

Q Were you listed in the 1971-72 Suffolk County telephone directory?

A Yes.

Q How many George Zimmers are listed there?

A One, to my knowledge.

MR. WILSON: No further questions.

MR. O'BRIEN: No questions.

MR. SHARGEL: No questions.

THE COURT: You may step down.

(Witness excused.)

MR. WILSON: The government rests, your Honor.

THE COURT: Members of the jury, that means the government has concluded its case. All the testimony that it is going to present here has been offered.

Before we proceed further this afternoon, I think it is necessary that we take a recess again. It shouldn't be more than five or ten minutes.

(The jury left the courtroom.)

MR. O'BRIEN: Your Honor, at this time the defendant Donovan moves, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a directed judgment of acquittal on the grounds that the government has failed to establish beyond a reasonable doubt the essential elements charged in both Counts 1 and 2, sir.

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With regard to Count 2, I submit that the government was required to prove that Mr. Donovan either sent or caused to be sent through the mail the letter specified in the indictment.

With regard to that, the witness has testified that he received a telephone call the previous day and in that telephone call the caller ordered certain jars, and that there was no discussion whatever regarding a letter, and that the caller never asked him to send a letter. For some unexplained reason, the witness--and I forgot his name--

THE COURT: Edward Hussey.

MR. O'BRIEN: Mr. Hussey sent a letter. The letter added nothing. It was not necessary. The order had already been placed. Mr. Hussey, on his own initiative, decided to write a confirming letter.

In United States against Weissman, 83 Fed. 2d 470, a Second Circuit case--and there is an annotation on that case too dealing with causing the mail to be sent under the mail fraud statute--held, among other things, that the mailing must be the natural and foreseeable consequences of the act intentionally done by the defendant, with knowledge by the defendant at that time that such a mailing would actually take place.

There is an annotation on that. I cited it in my requests to charge. I cited this case within the ALR, an annotation which deals with that case and other cases.

It is clear, your Honor, that not every use of the mail makes it a mail fraud. There have been a number of cases, one as recently as 1971 in the Second Circuit, United States against Chasin, 451 Fed. 2d 301, where they held that not every tangential use of the mail makes a local fraud case into a federal fraud case, and you must consider the extent of the contribution which the mail made to the success of the scheme and find that the mails were used as an essential ingredient of the scheme.

I'd say that Count 1, that letter, does not come anywhere near the requirements set forth in that case.

Also, your Honor, as recently as November 14, 1973, the Supreme Court in United States against Mays has criticized a number of circuit courts." There was argument on that case and I have it cited here, your Honor, only in the Criminal Law Reporter I don't think the case is reported as yet. I would hand it up to the court and ask the court to consider that.

Basically, they said that not every use of the mail makes a mail fraud case, and it dealt specifically with credit cards. They said that the per se rule, or

they indicate that the per se rule, that the defendant should have known, if he uses a credit card, that credit card companies send things through the mail--

THE COURT: There hasn't been a decision yet on this by the Supreme Court. It is pending. I know. I have a couple up in the Court of Appeals on which they have affirmed credit card uses of the mails--I guess the last one was--and our circuit, so far, has held that that is sufficient.

Our circuit still, unless the Supreme Court comes down with something to the contrary, holds that U.S. against Mays is the applicable law in the circuit. I can't do anything about that.

Thanks for this but we haven't gotten a decision yet on that.

MR. O'BRIEN: With respect to Count 2, your Honor, again, the purchase order, I cite United States against Chisholm, which is a Second Circuit case, and it must be--even the purchase order there--must be that the mailing was an essential ingredient to the scheme.

I don't even think the purchase order reaches an essential ingredient to the scheme whereby products--

THE COURT: Let me suggest this. I don't have much problem with the purchase order as clearly being within

this. I have some problem with Count 1. I want Mr. Hussey's testimony re-read to me.

I am going to deny the motion at this time with respect to Count 1. I am going to have Hussey's testimony re-read to me, and you will know before you sum up whether you are going to have Count 1 go to the jury or not.

Unfortunately, the court reporter who was here yesterday is out sick today. I am assured he will be here tomorrow morning, and I am going to try, in the meantime, to see if we can't have someone else re-read to me Hussey's testimony.

The way it is now, I am going to deny that motion.

MR. O'BRIEN: At least I am relieved that I don't have to sum up today.

THE COURT: You fellows have done a pretty good job on agreeing not to agree. It's all right. I may still have defense counsel sum up today.

MR. O'BRIEN: As far as the time of the mailing, there has been a number of cases, one in the Third Circuit and a Supreme Court case, which has held that the scheme to defraud must have been devised prior to the mailing and that if the mailing took place before the scheme to defraud was devised, that that wouldn't constitute mail fraud.

Here that letter was in January and the purchase

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order was in February of 1972. The evidence shown here was that none of these products were sold until July of 1972 and the government--

THE COURT: They could not have been sold until the jars were obtained anyway.

MR. O'BRIEN: It is a factor that bears on it, your Honor. I don't say that answer is it. My point is that the government has not in any manner, shape or form produced any evidence to show when the scheme was actually devised.

If it was devised after the mailing, then we have no mail fraud case and we have a local fraud case which is punishable as a misdemeanor under the general business law.

THE COURT: Isn't that really a question of fact for the jury to determine on the basis of all the circumstantial evidence in this case, the same as a conspiracy is never put down in writing, and so forth? I think that's the applicable law in this case.

MR. O'BRIEN: I feel, if there is something--there is no evidence here, and I can't see how a jury could, without reason, find the defendant guilty on the evidence that's been produced.

THE COURT: When was the phone established in

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Zimmer & Associates?

MR. WILSON: September of 1971, your Honor. Prior to January 18, 1972 Mr. Hussey testified that he had had prior business dealings with Mr. Zimmer and had sent him some other samples of an opal jar which is a different kind of jar.

There is also in evidence, your Honor, a letter sent to the Sterling Seal Company which talks about how Zimmer & Associates, at a time earlier than the purchase order for the jar caps, which is 12/13/71, prior to that time they already ordered a different kind of seal.

In other words, it appears that Zimmer & Associates have been set up and are doing things prior to the start of 1972.

MR. O'BRIEN: See, your Honor, that supports my point for this reason, that if Zimmer & Associates were involved in a legitimate business and then some time after the letters are written they go into an illegitimate business, it is not mail fraud, very simply.

THE COURT: I think that's an argument that has to be made to the jury rather than on the law, really, as a question of fact, rather than a question law.

MR. O'BRIEN: I believe your Honor has to find some facts to support that the scheme was planned.

THE COURT: As I say, I am going to deny the motions. I have no problem with Count 2. I have some reservations about Count 1 which you will know about before you sum up.

MR. WILSON: Do you want to hear me, your Honor, on Count 1?

THE COURT: Why don't I hear Mr. Shargel first. Incidentally, is there going to be any further proof this afternoon?

MR. O'BRIEN: Yes, your Honor.

THE COURT: If not, I was going to let the jury go.

MR. SHARGEL: May it please the court, at this time, on behalf of the defendant Dennis D'Amato, I move, pursuant to Rule 29-A of the Federal Rules of Criminal Procedure, for a judgment of acquittal on the grounds that the evidence adduced by the government is insufficient to support a finding beyond a reasonable doubt that the defendant is guilty on any of the counts.

I would like to, specifically, or first, specifically, address myself to Counts 1 and 2, that is the mail fraud.

Aside from the arguments advanced by Mr. O'Brien and recognized by the court on Count 1, it is my position that the evidence has not connected the defendant Dennis D'Amato

with the scheme to defraud.

I would like to view the evidence in a light most favorable to the government, as we must, at this point in time. There is no question about the fact, and it was brought out through testimony and through stipulations, that the defendant Dennis D'Amato was selling products to consumers that was counterfeit Ultra Sheen. We don't contest that fact. That's been amply proven here.

The defendant's position, of course, is he didn't know it was counterfeit, and that, rightfully, is a question for the jury.

However, our position is that there is no evidence which brings the defendant Dennis D'Amato within the province of the Federal law, that is a mail fraud. There has been no connection between Dennis D'Amato and Zimmer Associates whether that included the defendant on trial or anyone else.

If the defendant Dennis D'Amato sold counterfeit Ultra Sheen, even assuming for the moment and for purposes of this argument only, that he knew that Ultra Sheen to be counterfeit, that doesn't mean that he entered into a scheme knowing that the mails were used or expecting that the mails would be used.

I would like to analogize this to the long line

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of cases that interpreted what knowledge is necessary on behalf of a defendant when charged in a scheme or conspiracy. I think the record would indicate that earlier in this case your Honor stated at a side bar conference that the rules regarding a scheme under Section 1341 are pretty much similar to conspiracy in terms of proof, the statement of one co-schemer being analogous to the statement of a co-conspirator.

With regard to conspiracy vis-a-vis the substantive offense, if it were found that the defendant D'Amato were in a federal conspiracy, it would necessarily have to be proved that he had knowledge that mailings were taking place in furtherance of the scheme.

The cases in the Second Circuit have made it clear that the gist of this offense is a mail fraud. Otherwise, this would be prosecuted in the state court. There has been absolutely no evidence, may it please the court, that the defendant Dennis D'Amato had actual knowledge or reason to know that the mails were being used in furtherance of the scheme.

I would submit to your Honor that unless it were found that the defendant Dennis D'Amato actually mailed something or had actual knowledge of the mailing, in lieu of that Mr. Wilson must prove, (1) either the knowledge that

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it was a scheme involving the mails, or (2) that he must have reasonably foreseen that it was a scheme involving the mails.

Again, assuming all the government's evidence is true, if the Ultra Sheen had been supplied to the defendant to be sold in the State of New York, there has been no evidence here that Dennis D'Amato knew where the jars came from, knew where the contents came from, the labeling, the caps. I think we would have to reach very, very far, your Honor, to find that this man had any knowledge that the mails were employed in furtherance of the scheme.

THE COURT: Mr. Wilson?

MR. WILSON: Your Honor, if I could address myself first to Mr. Shargel's point, if the evidence, as the government contends it does, shows that Dennis D'Amato was a part of this scheme to defraud, then it envisioned that there would be an ordering of jars, an ordering of jar caps, contact being made by other participants in the scheme with the suppliers--

THE COURT: As of what date, though, do you have proof here of defendant D'Amato being a part of the scheme?

MR. WILSON: I think, your Honor, that based on the statement in his own affidavit, which we contended to be

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false, that it is October of 1971 when he purchased the Ultra Sheen . One could point to that date. One could certainly point to the date when his brother picked up the jar caps, March, 1972.

THE COURT: March of 1972 is subsequent to the mailing here.

MR. WILSON: That is correct, your Honor. I don't believe it is a question of simply time that a defendant joins the scheme or the proof shows he joins the scheme.

I think it is more a function of what is the scheme all about. Certainly the scheme has to, as part of its reaching fruition, it contemplated a use of the mail somewhere along the line. Here, of course, the mails were used throughout the scheme.

THE COURT: Wouldn't you have to show when he became a part of the plan or the scheme?

MR. WILSON: No. I don't believe the law requires that, your Honor. I would suggest to the court, in any event, that since Mr. D'Amato has been traced to almost 16 or 17,000 of the 28,000 jars, that he was undoubtedly a participant in this from the beginning.

THE COURT: I don't know.

MR. WILSON: The mere fact that he is the man who disposes of all of it--

THE COURT: I say that if he had joined this scheme after the mail fraud had taken place, that he could be part of it.

MR. WILSON: He didn't join it after the mail fraud took place.

THE COURT: Using the mails is in the counts which we have here, January 18 and February 17 of 1972.

MR. WILSON: That's correct, your Honor.

THE COURT: Assume he joined this scheme subsequent to that.

MR. WILSON: If we were to assume that, and when he joins the scheme is obvious that--

THE COURT: The mailing has already taken place.

MR. WILSON: I think that is legally without significance, your Honor, if the scheme itself embodied a use of the mails that was obvious to all participants.

THE COURT: But the mailing has taken place before he joins the scheme.

MR. WILSON: He is part of the scheme, an essential part of the scheme, the part of the scheme that allows them to make the money.

If they never sold this product, your Honor, there is no scheme, there is no fraud. The fraud is a never ending thing that ends with the first sale of the

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first completed product to some purchaser. I don't think that it matters for purposes of the mail fraud statute, and I will try to find cases for your Honor over night or before the evening is too far gone. I don't think it can matter for purposes of the scheme that the defendant definitely becomes part of it after some of the mailings or the mailings in the indictment take place.

THE COURT: As far as we go with the direct evidence that you presented in here, it doesn't appear that the defendant D'Amato joined this until subsequent to the date of the second count, which is February 17, 1972.

MR. WILSON: I must say, his brother picking up the jar caps in March--

THE COURT: He said sometime in March, 1972.

MR. WILSON: That suggests to me, your Honor, Mr. Robert D'Amato didn't become part of the scheme in March--

THE COURT: What else is there with respect to Mr. D'Amato here?

MR. WILSON: I am suggesting, your Honor, if the fact of Mr. Robert D'Amato's connection with this scheme sheds light on Mr. Dennis D'Amato's involvement, it means Dennis D'Amato was involved prior to his brother picking up the caps.

THE COURT: That may mean the day before. I am

asking what the proof is here as to when the government or what the government points to to show that Dennis D'Amato was a part of this scheme, as of what date? That's what I am asking.

MR. WILSON: I think other than the inferences which flow from the entire scheme which would put him in earlier, the only thing I can point to as a fact is the date he himself puts in the affidavit of October, 1971.

MR. SHARGEL: Judge, may I be heard on that?

THE COURT: Just a moment. You will get an opportunity.

MR. WILSON: If that statement can be rejected in part and separated in part, it can be accepted in so far as it indicates his involvement, as of that date, in whatever was going on.

Don't forget, our other documents do suggest that in September of 1971 this thing began.

THE COURT: I am aware of that. That is Zimmer Associates and you connected Donovan with Zimmer & Associates.

Presumably, the jury might infer that Zimmer & Associates is Donovan. But I am taking the proof in a light most favorable to the government. There is nothing to infer in here from any of the proof that D'Amato is any part of Zimmer & Associates. That's what I am having difficulty

with.

MR. WILSON: I disagree, your Honor.

THE COURT: Prior to March of '72?

MR. WILSON: The evidence in this case--

You are agreeing that after March of 1972 he is connected?

THE COURT: Yes. I am saying the jury may find that. I am not saying that it is so.

MR. WILSON: I could only be repeating myself. I know the facts, your Honor knows the facts. I think that when you have a scheme where the man disposed of the vast bulk of the finished product, the jury can infer that he was part and parcel of it from the beginning. It doesn't start that much earlier. We are not talking about some scheme that started three years down the road and then--

THE COURT: The dates in here, it says from September, 1971 to the date of the indictment, which is last week or something.

MR. WILSON: What I am suggesting is, this scheme doesn't start--

According to the evidence in this case, the earliest that the scheme starts is September, 1971, the order for the caps. It is his brother who picks up the caps. I think the jury can infer that Mr. Dennis D'Amato

was involved in this from the time this whole thing commenced. He is the guy who disposes of it. He is the man with the facilities.

THE COURT: That is what exhibit?

MR. WILSON: 13 in evidence. The purchase order from Zimmer & Associates to Sterling Seal dated September 13, 1971 and it orders the first shipment of caps.

I think the jury can infer all of these people were involved from the beginning. There is no reason to separate them out. There is no reason to say that, arbitrarily, Dennis D'Amato joined up later. Especially, I rely primarily on that ultimate fact, that he disposed of almost all of it, nobody else.

MR. SHARGEL: First, I would like to submit a case which holds, in essence, and it is only one instance, that in order to constitute a mail fraud, it is necessary that a scheme to defraud be devised and that afterwards a letter, etc., be placed in the mails for the purpose of executing the scheme.

That's in line with what your Honor brought out on the timing of the mailing. The citation for that is United States versus Berg, 144 Federal Second, page 173, Third Circuit.

I have yet to find a rule of law that states that

when evidence shows that the defendant's brother is involved in an aspect of the scheme, that that necessarily means that the defendant is involved.

THE COURT: What that shows is that at the insistence of the defendant, the brother did pick up some of the--

MR. SHARGEL: No, Judge, that wasn't the proof. It was clear, and I think that Mr. Wilson will agree, that the direction to pick up those caps didn't come from the defendant D'Amato but came from the uncle, Joseph Vetree.

As a matter of fact, Robert D'Amato emphatically and categorically denied, I think, in the Grand Jury and here at the trial that the defendant D'Amato had nothing to do with that order to pick up those caps.

MR. WILSON: That's wrong, your Honor. He always said he didn't really know anything about anything, and here he did say that his uncle directs him to do things.

In the Grand Jury he said when his brother wants him to do a favor, his brother goes to his uncle and his uncle directs him to do it.

The inference from the pick-up is that the defendant D'Amato was involved either alone or with his uncle.

THE COURT: He says, "Delivered the Ultra Sheen at the request of his brother to Jomar Distributors." That

is part of the scheme and device alleged here by the government.

MR. SHARGEL: Another thing I would like to urge again: I analogize this to a Kotiokis-type argument, and if not Kotiokis, then certainly Borelli. I think we have here evidence of more than one scheme.

Again, the evidence, taken in a light most favorable to the government, is that the defendant Dennis D'Amato was involved in the sale of counterfeit Ultra Sheen. That does not mean that he was involved in the manufacture of the counterfeit product. Only the shceme involving the counterfeit product involved the use of the mails.

There is absent absolutely no evidence here to indicate that the defendant D'Amato knew of the mailings, knew that mailings had to be used in furtherance of the scheme.

THE COURT: I wouldn't accept that argument; no.

MR. WILSON: I just want to comment on the government's theory here, your Honor.

The scheme starts with the beginning of the idea that we are going to make and sell a counterfeit product, and then you set up your Zimmer and Associates, and you start your orders, and you get the stuff, and you fill them and you sell it. It is all useless if you break it up into

a manufacturing--

THE COURT: That exhibit was December, 1971?

MR. WILSON: Yes.

MR. SHARGEL: How are the mails connected to Dennis D'Amato? I don't mean to be asking the court a question but--

THE COURT: I am satisfied on Counts 2 and 3.

I have a reservation on Count 1 under 32(b).

MR. SHARGEL: I would like to briefly address myself to Count 3.

THE COURT: All right.

MR. SHARGEL: I would submit to your Honor that Count 3 should be dismissed or a judgment of acquittal should be entered on the ground that no material fact in that affidavit is proven to be false.

The government has successfully proven, indeed through stipulation, that it appears as if there was no such thing as Balzac Trading Company.

That does not mean that the defendant did not obtain these items from someone representing himself to be Balzac Trading Company.

There was nothing in the affidavit stating that the defendant either telephoned or, in fact, he said he didn't telephone Balzac or visit that address.

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The October, 1971 date appears to be a very convenient date for Mr. Wilson. He likes to use it as the jumping-off point for the entrance into the scheme, but, on the other hand, he says that was false; there was no scheme in October, 1971.

He also points, subject to contradiction by Mr. Wilson, which I am sure will be forthcoming--he also makes reference to a number with regard to one of the recipients of the Ultra Sheen, that wasn't included in the affidavit, Victoria Sales. Mr. Wilson has failed to show that anything in that affidavit was false.

MR. WILSON: The core of the affidavit is Mr. D'Amato's assertion that in good faith he made a purchase from Balzac Trading Corporation.

We have established there is no Balzac Trading Corporation, which is Step 1.

We have established that Mr. D'Amato here said, "I purchased a total of 1130 cases from Balzac Trading, and that's the only Ultra Sheen I ever had."

He made a mistake when he wrote the affidavit. He didn't have the records. He sold 15 or 1600 dozen. He said it was false.

We say it is false because they didn't come from this fictitious Balzac. The story itself, your Honor, "I

bought it from Richey off a street corner, and who knows who Richey is," the internal inconsistencies, show it to be a false story.

Frankly, your Honor, there is one more point, and I can't quite put my finger on it.

Oh. The most obvious fact, your Honor, which is Robert D'Amato's involvement. If this case was standing in the posture where we had a Robert Donovan who is the Zimmer and Associates man who is making up the counterfeit material and we had a Dennis D'Amato and there was no connection between the two of them at all, then the government's case would be very hard, just relying on the facts that I recited.

But here we have got the fact that the man who is selling it does have a connection to the man who is making it, and the connection is dramatically shown by Robert D'Amato who is picking up the caps ordered by Robert Donovan and is later delivering the finished product to a garage or a seller of Ultra Sheen. They are linked together.

That also goes to make this a phoney basis for the government's charge in Count 3.

MR. SHARGEL: I'm sure your Honor has tried many 1001 violations and perjury violations. For Mr. Wilson

to stand up here and point to the part about Richey, he is suggesting inneundo, it appears false. The government can't get up and say it appears false. They have to prove beyond a reasonable doubt that it is false.

I hesitate to say this, but I can't see how Mr. Wilson can stand up there in good faith and say, "The difference between 1130 cases and 1600 cases is, when at trial there was an admission on Victoria Sales, is a material fact which was misrepresented to an agency of the United States."

THE COURT: What about the Balzac situation?

MR. SHARGEL: Judge, it wasn't proven false.

All that was proven is that there is no Balzac Trading Company. If Dennis D'Amato had said in his affidavit that, "I went to Balzac Trading Company," or that "I phoned Balzac Trading Company," then yes, Mr. Wilson has proved that it did not happen. It could not have happened because there is no such address or phone number.

Mr. D'Amato, on the other hand, stated in his affidavit to the District Court in the Eastern District, "I got this from a person representing himself to be Balzac Trading Company," that has not been demonstrated in any manner, shape or form to be false.

The October, 197? starting-off point, while I

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think it is uncertain whether it is true or false, and that hasn't been amply demonstrated, is not a material fact, I respectfully submit.

The difference of some 230 cases, when Victoria Sales was admitted at trial, is not a material fact.

I renew my previous motion to dismiss Count 3 on the venue argument, which was fully submitted before.

THE COURT: No. I deny that motion, with an exception.

MR. WILSON: Your Honor, if I'm right, the only area where the government has a problem now is with respect to Count 1 as to both defendants.

THE COURT: Yes.

MR. WILSON: I will try to do more research in that area. I know the court has seen the cases that are cited.

THE COURT: Yes.

MR. O'BRIEN: Your Honor, I have two witnesses I do intend to call.

THE COURT: Let's proceed.

MR. O'BRIEN: I haven't talked to these witnesses at all. Actually, they are under Mr. Wilson's control. I would like an opportunity to speak with them.

THE COURT: How long is it going to take?

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MR. O'BRIEN: 5, 10 minutes.

THE COURT: All right.

MR. O'BRIEN: The witnesses will be very short.

THE COURT: Mr. Shargel?

MR. SHARGEL: I am prepared to rest my case, your Honor.

THE COURT: All right. We will give you ten minutes.

(Recess.)

(In the robing room.)

THE COURT: I am going to reserve as to D'Amato on Counts 1, 2 and 3.

As to Donovan, on Counts 1 and 2, I am going to deny the motions, with an exception.

I had reread to me part of the testimony of Edward Hussey, especially on cross-examination where he said, as a matter of practicalities, that they do that, and I think sending the letter of January 17th or 18th is part of that.

That is a question of fact for the jury.

MR. O'BRIEN: Wouldn't Mr. Donovan have to know that, though?

THE COURT: I think under the cases, if he had reasonable cause to believe, that's an argument you can

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make, but I think as a matter of law that I cannot dismiss it as to that.

I am still troubled about the time element on Mr. D'Amato.

MR. WILSON: With respect to all three counts, or just Counts 1 and 2?

THE COURT: Counts 1 and 2.

Of course, you have a problem. If he's out of 1 and 2, what is he doing in 3?

MR. WILSON: Because he lied in an affidavit about his involvement, which has nothing to do with the mail fraud.

MR. SHARGEL: The question is, does the proof show that?

MR. WILSON: I would point to one other fact, if you are troubled with the falsity in the affidavit, whether the jury will find that the affidavit is--

THE COURT: That's all right. It is going to be a question of fact. I am going to submit it to the jury.

MR. WILSON: Count 3?

THE COURT: Yes. I am going to submit--

MR. SHARGEL: Your Honor indicated that you reserved on Counts 1, 2 and 3 as to D'Amato.

THE COURT: I'm sorry. I am going to deny. You

are right.

Wait a minute. I'm reserving. I have a right to reserve under 32(b) and determine, after the jury comes in, whether or not I am going to do it that way.

MR. SHARGEL: Can we make one thing clear? Which counts are you reserving on, your Honor?

THE COURT: 1 and 2.

MR. WILSON: With respect to the defendant D'Amato?

THE COURT: Exactly. I'd like you to show me a little more. You can do it now or later, depending upon the results here. I would like you to show me the extent of the falsity, the claimed falsity in that affidavit.

MR. SHARGEL: May I make one further inquiry?

Your Honor perhaps just misstated that you would make the decision when the jury returns. Do you intend to make the decision before summations?

THE COURT: I intend to submit it to the jury. I am going to submit the case to the jury, and under 32(b) I have the right to do that. 32(b) gives me the option of doing that, and I suppose I could deny and still set it aside if the jury came in contrary to what I would think, but it is going to be submitted to the jury.

(Pause.)

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(In open court.)

JAMES CHAVIS, having been previously sworn, was recalled and testified further as follows:

DIRECT EXAMINATION

BY MR. O'BRIEN:

Q Mr. Chavis, you recall yesterday that during your direct examination the government introduced into evidence Exhibit No. 22, which is an invoice of IdealDecorating?

A That's correct.

Q At that time I asked you to obtain, if you would, certain records for me.

A Yes.

MR. O'BRIEN: I ask that this group of records be marked as Defendant Donovan's Exhibit E for identification.

(Defendant Donovan's Exhibit E was marked for identification.)

Q I show you Defendant Donovan's Exhibit E for identification and ask if these are records that Mr. Bookbinder gave to you.

A Yes. These are the records that he gave me.

Q Are they records kept by Ideal Decorating in the ordinary course of Ideal's business?

A Yes, they are.

MR. O'BRIEN: I offer them in evidence.

MR. WILSON: No objection.

THE COURT: They are received.

(Defendant Donovan's Exhibit E for identification was received in evidence.)

Q Those records all begin with the number 03, is that correct?

A Are you speaking in reference to these that I have in my possession?

Q Yes. The ones that are marked Defendant's Exhibit--

A I didn't check them.

THE COURT: He is asking you to check them now.

Q And tell us if they all begin with 03.

(Pause.)

A 03 are the first two numbers.

Q Government's Exhibit 22 also begins with 03; is that not correct?

A That's correct.

MR. O'BRIEN: I ask that the two books be marked as defendants' exhibits.

THE COURT: Any objection?

MR. WILSON: No, your Honor.

THE COURT: They will be received in evidence.

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MR. O'BRIEN: These books are not pertinent, and I'd like to explain that through the witness.

THE COURT: All right. Mark them for identification.

(Defendant Donovan's Exhibits F and G were marked for identification.)

Q I show you Defendant's Exhibit F for identification and ask you whether these are records kept in the ordinary course of Ideal Decorating's business.

A Yes. These are our records.

Q In Defendant's Exhibit F, all of those exhibits begin with 01, do they not?

A That's correct.

Q Now, I show you Defendant's Exhibit G for identification and ask if these are records kept by Ideal Decorating in the ordinary course of its business?

A Yes, they are.

Q All of these records begin with 02, do they not?

A That's correct.

Q Just one last question.

On this silk screen, this is the silk screen that you made; is that correct?

A Yes.

Q I talked with you in the witness room prior to

your taking the stand here, did I not?

A Yes.

Q Is it a fact that this silk screen was made in 1971?

A Yes.

MR. O'BRIEN: I have no other questions.

MR. WILSON: The government offers what has been marked as Donovan's Exhibits F and G.

MR. O'BRIEN: The only objection I have, your Honor, is that I don't believe they are at all pertinent to this case and they do not involve Government's Exhibit 22 because that begins with the--

MR. WILSON: Your Honor, he asked questions about a document not in evidence. I had no objection to it at the time. I don't know what argument he is attempting to make, but I want them all before the jury.

THE COURT: They will be received.

(Defendant Donovan's Exhibits F and G for identification were received in evidence.)

CROSS-EXAMINATION

BY MR. WILSON:

Q Mr. Chavis, do you know whether F and G and D and Government's Exhibit 22 constitute all the invoices that are at Ideal Decorating Company?

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A No, I don't

Q Prior to taking the stand today, when did you first see F and G?

A Prior to taking the stand was the waiting room.

Q Right back there in the witness room?

A Yes.

Q Did you bring with you from your place of business these--

A Yes.

Q Do you know why E is loose and F and G are in folders or binders?

A No.

Q Do you know whether Mr. Bookbinder knew that he was knowingly assisting in the making of a counterfeit product?

A No.

MR. O'BRIEN: Objection, your Honor.

THE COURT: Sustained.

MR. WILSON: I have no further questions.

REDIRECT EXAMINATION

BY MR. O'BRIEN.

Q F and G were in whose possession, if you know?

A I don't know. I just saw them once I'm here in the witness room.

Q Who gave them to you?

A I didn't bring these down.

Q Didn't Mr. Wilson give them to you?

MR. WILSON: I will stipulate that I obtained those records.

Q So Mr. Wilson gave them to you, right?

A I could say that; yes.

Q These records were given to you by Mr. Bookbinder?

A That's correct.

Q Yesterday, do you recall that I asked you to bring in invoices that preceded 03951 and subsequent to 03951 or, in other words, 03950 and 03952? Is that correct?

A Yes.

MR. O'BRIEN: Okay.

RECROSS-EXAMINATION

BY MR. WILSON:

Q Did you tell Mr. Bookbinder what you had been told to do yesterday?

A Well, according to the way I understand this regarding the invoices, I thought that my position was relinquished due to the fact that I am not in any administrative body of this business.

Q So you didn't speak to Mr. Bookbinder about what you had been told here?

A No, because I got the understanding--

THE COURT: The answer is No, right?

THE WITNESS: Yes.

REDIRECT EXAMINATION

BY MR. O'BRIEN:

Q Isn't it a fact that Mr. Bookbinder spoke with Mr. Wilson and that Mr. Wilson requested Mr. Bookbinder to bring in certain invoices?

A Well, I can't say that Mr. Bookbinder spoke to Mr. Wilson?

MR. WILSON: I will stipulate that I made a request through an attorney for the production of certain invoices.

THE COURT: I guess, Mr. Chavis, you are finished.

(Witness excused.)

THE COURT: Next witness.

MR. O'BRIEN: I rest.

MR. SHARGEL: The defendant D'Amato rests.

THE COURT: Any rebuttal?

MR. WILSON: No, your Honor.

THE COURT: That means everybody rests. That means we have concluded all the testimony in this case. That means that I can get you out of here on time.

May I ask if there is any requirement for tomorrow

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evening in connection with the holiday?

JUROR NO. 4: That's a moot point, your Honor.

THE COURT: Let me suggest this to you: I don't want to in any way influence any actions of anybody, or put any pressure upon anybody, but the chances are that with the testimony completed, there would be no way of completing summations tonight, which I had hoped we might be able to do, and then charge the jury the first thing in the morning. But we can't do that. It is too late now.

I am going to try and start at 9:30 in the morning with summations of counsel,which will be argument of counsel, and the charge of the court. It is not likely that you will get this--I'm talking to all of you--case much before noontime.

I am going to have available for you tomorrow, though, when you come in, or sometime during the first recess that we have in the morning, the menu so that you can order your lunch and won't have to take the time of going out into the outside, which would take an hour-and-a half. You have to go in a body and the restaurants around here are difficult to come by. So I am going to have available for you menus from which you can place your orders. Lunch will be brought to you in the jury room while you are deliberating. I don't want anybody to feel

any pressure about the time of deliberating. You can have as much time as is necessary for you to arrive at whatever result you are to arrive at, and that is all I am suggesting, and we will face that tomorrow.

That's the schedule now. This case will be submitted to you some time about noonday tomorrow.

Again, you are going home, you have heard all of the testimony, but you haven't heard the law. Until you have heard the law, as I have said before, you are not in a position to make up your minds about this case.

Go home, have a pleasant evening and I will see you here in the morning at 9:30.

(Jury not present.)

THE COURT: Gentlemen, I mentioned before, I think I said Rule 32 which is a reduction of sentence, but it is Rule 29-B in connection with my reservation on the motions.

I assume you gentlemen have the same motions that you made at the end of the government's case.

MR. O'BRIEN: Yes.

THE COURT: That you both make now.

MR. SHARGEL: Yes.

THE COURT: The same rulings are made as were made at the end of the government's case.

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You have submitted requests to charge. My charge will be ready at about 5:30, quarter to 6:00 this evening. You are welcome to come in at 9:00 o'clock in the morning, if you like, to see the charge before you sum up. I do that with counsel when practicable, but I expect that you will not encroach upon my province of discussing the law with the jury.

I am saying what I am going to charge. This is a guideline and an assist to you to see what the charge is going to be like. It is not for you to take away from me the functions that I have as the judge to give the law to the jury in the case.

I don't expect counsel to argue law any more than is absolutely essential, not only in this case but in any case. I extend to you the privilege of seeing what my charge will be, which I think will comply with the provisions of law that I must indicate to you how I am going to rule on requests to charge.

MR. O'BRIEN: In that regard, your Honor, there are a number of things I would like to argue to the jury and I would like your Honor's opinion on whether or not I am going to encroach upon your Honor's charge by my saying it.

I think my defense of Mr. Donovan is going to be

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technical to a great extent, and I am going to argue, for example, that if they find that the fraud was committed prior to the time of the mailings, preceding the devising of the scheme to defraud, that they could acquit.

Would your Honor feel that to be an encroachment upon the law? I am not going to say "This is the law." I am going to say "I think the facts have shown that--" I am giving Mr. Wilson some free discovery.

MR. WILSON: I would have heard it before I got up any way.

MR. O'BRIEN: I am going to say "The facts I submit to you have shown that the letter was written way before there was a scheme to devise."

THE COURT: I really can't rule in advance on it. If there is objection, I will have to pass upon any objections that are made. I do not expect you to take out and put in your summation my charge to the jury. I don't expect you will abuse this. I have made my charge available to other counsel at other times and they haven't done that.

MR. O'BRIEN: In that regard, I think maybe I'd be better off not taking your offer--

THE COURT: It won't make any difference one way or the other.

MR. WILSON: If Mr. O'Brien is suggesting that

he can argue to the jury that they can find the scheme started on February 2 and the government has failed in its proof, he is already off base.

THE COURT: Yes. He is already misstating the law.

MR. WILSON: If that's what I gather is the gist of his argument, he is wrong.

MR. O'BRIEN: Then I would be penalized by your Honor's charge to the jury.

MR. WILSON: I would have to object because they might get confused. I would have to object because the jury might get confused.

MR. O'BRIEN: I will have to rework my summation.

THE COURT: You have plenty of time, too much time to deliberate on your summations.

As I say, requests will be marked up and you may look at my charge if you like.

(Adjourned to December 20, 1973.)

CHARGE OF THE COURT (12:15 p.m.)

THE COURT: Members of the jury, I am sure that you can understand by that announcement and the fact that no one is permitted to enter or leave the courtroom during the charge, that is so you will not be distracted from what I have to say to you because my instructions to you on the law are most important.

You are about to enter upon your final duty, which is to decide the facts issues in this case. I told you at the very start of the trial that your principle function during the taking of testimony would be to listen carefully and to observe each witness as he testified, and it has been evident, as counsel themselves have noted, that you have fully discharged that duty.

You are to perform your final duty in an attitude ofcomplete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the government or to the defendants as parties to this controversy.

The case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, it is important to each of these defendants who are charged with serious crimes.

The fact that this prosecution is brought in the name of the United States of America entitles it to no greater consideration than that accorded to any other party to the litigation. By the same token, it is entitled to no less consideration. All parties stand as equals at the bar of justice.

Your final role is to pass upon and decide the fact issues in this case. You, the members of the jury, are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, and you resolve such conflicts as there may be in the testimony and draw whatever reasonable inferences that are to be drawn from the facts as you determine them to be.

My function at this point is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine the facts to be, and the logical result of that application will be your verdict in this case.

As I have informed you a number of times, with respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel either for the government or for the defendants may have said with respect to matters in evidence, that is to say, any factual matter,

whether stated in a question, in argument or in summation, is not to be substituted for your own recollection.

And so, too, anything that the court may have said during the progress of the trial with respect to a fact matter or that I may say during the course of these instructions, is not to be taken in substitution for your own independant recollection, which governs at all times.

Now, before we get to the precise charges involved here, I am going to give you a few preliminary observations. In determining the facts, you should not be influenced by rulings that the court may have made during the trial. These rulings dealt with matters of law and not with questions of fact.

The court's rulings on objections made by either the attorney for the government or the attorney for one of the defendants, are not to be considered by you. Counsel not only have the right but, indeed, it was their duty to press whatever objections they believe existed as to the admission of offered evidence or on any other legal problem raised before me.

During the course of the trial there may have been occasions when I may have admonished either one or the other attorneys here. Sometimes in the ardor of advocacy counsel say or do things which in calmer moments they would not have

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said or done. These incidents must play no part in your deliberations. The personalities of the lawyers or of the judge have nothing to do with your resolution of the fact issues in this case.

I recognize as a human being that a judge can have a great deal of influence with a jury. I want you to understand that I have no opinion with respect to the guilt or innocence of these defendants. It is my function as a judge to mask in every way that I can from you any feelings that I might have with respect to the guilt or innocence of the defendants. If I have accomplished my purpose and done my job properly as a judge, you should have no inclination as to how I feel you should decide this case.

If you do think you have that feeling as to the inclunation of how you should decide this case, disregard it entirely. You are the judges of the facts and you are the sole judges of the guilt or innocence of these defendants. I am merely a judge of the law.

You are specifically to understand that I have no opinion as to the guilt or innocence of any one of these defendants, and the facts issues must be decided solely by you and only within the framework of the evidence and the principles of law that apply.

YOu are to consider only the evidence in this case,

and that evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, the facts which have been stipulated and the presumptions which I will tell you about in these instructions, such as the presumption of innocence.

But while you are to consider only the evidence in the case, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw fromthe facts which you find have been proved, such reasonable inferences as seem justified to you in the light of your own experience.

An inference is merely another word for a conclusion, which reason or common sense leads you to draw from the facts that have been proved here.

In considering the evidence, you must remember, as I told you at the beginning of this trial, that the indictment is only a formal method of accusing a defendant of the crime charged, andin itself is not evidence against the defendant. Nor is any weight to be given to it by the fact that an indictment has been returned against a defendant.

Generally speaking,there are two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testi-

mony of an eye witness, somebody who saw or heard something done or said.

The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. Generally, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial.

We have in this court, and I have used it, and some day I am going to find a new way of expressing this, the difference between direct and circumstantial evidence. But jurors here for the first time may find that perhaps the example that we commonly use is sufficient.

If we were looking out the window and can see that it is raining, that would be direct evidence, we would have the rain outside.

Now, let's assume on the other hand that we were in a courtroom right at the very entrance to the building, and assume that when you came into that courtroom in the morning, it being a courtroom in which there are no windows and there was no way that you could see outside.

Assume when you came into that courtroom that morning it was a nice, bright sunny day. Assume that after

we had been in there about an hour or an hour and a half, someone came into the courtroom and his clothes were rather damp and you could see that they were damp and wet.

Assume further minutes later another spectator came in and that spectator had a hat in his hand and the hat was dripping with water and he had an umbrella and the umbrella was dripping with water.

And assume further that a minute or two later another spectator came in with a raincoat and that raincoat was wet.

You could assume from these circumstances, even though you couldn't see the outside, that it was raining outside and that is circumstantial evidence, a chain of circumstances which leads you to conclude that a fact exists, or doesn't exist.

I am not going to go over the evidence withyou in thiscase. It has been a short trial, we commenced this trial on Tuesday morning, I guess, with the selection of the jury, and counsel have covered with you the evidence that they thought was necessary for you to hear in connection with their summations. I am just going to give the names of the witnesses who appeared before you and, where I have it, the occupation or what kind of business they were engaged in.

The first witness was Ernest Reinke, the owner of

the answering service at 1500 Man Street in Port Jefferson.

I am not going to, as I have said, go over the evidence in the case, but this helps, perhaps, to do it just by going over it this way.

The second witness was Phillip E. Patton, from Erie, Pennsylvania. He was employed by the Sterling Seal Company up there and they manufactured and made the screw caps.

He was followed on the stand by Edward N. Hussey, who was employed by Carr-Lowery Glass Company, as salesman here in New York City, and they made the glass jars.

The next witness was James Bausch, of Atkinson Freight Lines. He was followed on the stand by James Chavis, who worked for the Ideal Decorating Company in Brooklyn.

The next witness was Henry M. DAvis, who was an analytical chemist for the Food and Drug Administration for the Government, since 1960.

The next witness was Frank J. Capello, who was a clerk for the Jones Trucking Company, engaged in the general cargo business.

The next witness was Robert D'Amato, brother of the defendant Dennis D'Amato, and he was followed by Ernie Bodeck who was a wholesaler or health and beauty aids.

Then there was Gerald Herman of the Interstate

Cigar Company, which is also a wholesaler of health and beauth aids.

And then Herbert Duianyer of the Amster Company, also a wholesaler of health and beauty aids.

Also Marvin Reiner of Times Square Stores and then there were stipulations read that if certain witnesses were called, they would testify to certain things. A stipulation was entered with respect to the affidavit, which is exhibit 23 in evidence of Dennis D'amato, in connection with the case of Johnson Products pending inthe District Court for the Eastern District of New York, count three in this indictment about which more I will tell you later.

A stipulation that if Marylin Lynnberry were called she would testify with respect to exhibits three and four; Ruth Brown with respect to exhibit8, turned over to the government -- I am getting into a little bit of the facts, but it is your recollection of the facts that controls.

Kenny Burke with respect to exhibit 8. Richard Wasserberger of the Crown Glass Compan y; Edward Knoll -- I am only giving the live witnesses to you. Edward Knoll was on the stand, Baltimore, Maryland. He was the plant manager of the Carr-Lowery Glass Company, and there were more stipulations with respect to James Stafford of the New York Telephone Company and James Roy, an employee of the

Post Office Department, a mail carrier whose route covered 342 East -- I didn't get the name of the street -- but one of those here.

James Boyle, a postal inspector with respect to 14 Metropolitan Avenue.

Stipulations with respect that if the attorney were called with respect to exhibit 23, that the attorney would state that the facts were recited in Manhattan, it was prepared in Manhattan, signed and filed in Brooklyn.

The last government witness was George Zimmer.

Following that the witness Chavis was recalled and testified to you with respect to certain other matters, and I am not going to go into the evidence, or the testimony given here.

As I say, the case has been of short duration, counsel have adequately covered in their summations the necessary parts of the evidence that they think were pertinent for you t to pass upon the questions here, but you cannot take these instructions in a vaccuum, you must place them in context with the evidence adduced here.

Now, I indicated to you in addition to the facts, there are certain things that you could consider, such as a presumption, and I want to read to you now the law with respect to the presumption of innocence, burden of proof and

reasonable doubt.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The burden is always uponthe prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producting any evidence.

The indictment in this case contains three counts or charges.

A separate crime or offense is charged in each count of the indictment. Both defendants are charged in the first two counts; the third count charges the defendant D'Amato alone.

Each offense, and the evidence pertaining to it, should be considered separately. The fact that you may find either or both of the accused, guilty or not guilty of one of the offenses charged should not control your verdict

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as to any other offense charged against any defendant.

It is your duty to give spearate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any other evidence in the case which may be applicable to him.

In that connection, you will note that the affidavid, Exhibit 23, I believe it is in this case, was admitted solely against the defendant D'Amato, and is not to be considered in any way with respect to the defendant Donovan.

I am going to read to you now the pertenent parts of the statute involved in counts one and two, which is the mail fraud statute, Title 18, Section 1341.

"Whoever, having devised ... any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of... distribute, supply, or furnish or procure for unlawful use counterfeit and spurious articles for the purpose of executing such scheme or artifice of attempting so to do, places in any post office or authorized

depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter orthing, or knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing..." commits a crime.

Now, in each of the first two counts of the indictment:

"The Grand Jury charges:

"1. From on or about the 1st day of December, 1971, up to and including the date of the filing of this indictment" -- which is December 4, 1973 -- "Robert Donovan, also known as George Zimmer, and Dennis D'Amato, the defendants, and other to the grand jury known and unknown, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises and to sell, dispose of, distribute, supply, furnish and procure for unlawful use counterfeit and spurious articles.

"2. It was a part of said scheme and artifice that Robert Donovan, also known as George Zimmer, would purchase and cause to be purchased over 27,000 jars and jar caps which were of the same size and type as those used in the manu-

facture of a hair conditioner and dressing called Ultra Sheen and would cause the saidjars to be printed with a label identical in form to the label used on bottles of the true and genuine Ultra Sheen sold by Johnson Products Co., Inc."

"3. It was further a part of said scheme and artifice that Dennis D'Amato would procure and obtain possession of counterfeit and spurious jars of Ultra Sheen and would thereafter sell said jars as the true and genuine Ultra Sheen.

"4. On or about the dates hereinafter set forth, in the Southern District of New York, for the purpose of executing such scheme and artifice and attempting so to do, Robert Donovan, also known as George Zimmer, and Dennis D'Amato, the defendants unlawfully, wilfully and knowingly did place and cause to be placed in a post office and authorized depository for mail matter to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom, and didknowingly cause to be delivered by mail according to the direction thereon, the matters and things hereinafter described:"

Count one, the date is January 18, 1972, a letter from Carr-Lowery Glass Co., Inc., 415 Madison Avenue, New York, New York to Zimmer & Associates, 1500 Main Street, Port Jefferson, New York. That is count one.

Count two, the date is February 17, 1972, from Zimmer Associates, 1500 Main Street, Port Jefferson, New York, to Carr-Lowery Glass Co., Inc., 415 Madison Avenue, New York, New York, and the matter is a purchase order.

Those are the items charged in the first two counts.

Before you may find a defendant guilty of the crime charged in either count one or two, you must be satisfied that the government has proven each of the following elements beyond a reasonable doubt, as to the particular count you are considering.

1. That on or about the dates alleged inthe indictment, the defendants devised or became a party to a scheme or artifice to defraud.

2. That in devising or becoming a party to such scheme or artifice the defendant in question acted with knowledge of its fraudulent nature or with intent to defraud.

3. That a defendant did use or cause another to use the United States mails for the purpose of executing the scheme or artifice.

Each mail fraud count charges a separate use of the mails. Each separate use of the mail in furtherance of the scheme or artifice constitutes a separate and distinct offense. Accordingly, you must determine for each defendant

on each count that is before you whether the government has proved beyond a reasonable doubt these three essential elements of the crime.

I am going to give further definition of the elements concerning the existence of a scheme or artifice to defraud or to obtain money or property by false or fraudulent pretenses.

A "scheme or artifice" is merely a plan for the accomplishment of an object. A scheme to defraud, then, is any plan, device or course of action to obtain money or property by means of false or fraudulent pretenses, representations or promises calculated to deceive persons of average intelligence.

The second element is the knowing and wilful participation. If you find that the government has sustained its burden of proof that a scheme to defraud did exist as charged, you should consider the second element, and that is that the government must prove beyond a reasonable doubt in order to convict a defendant, that he knowingly and wilfully participated in the scheme or artifice to defraud and with intent to defraud and knowingly meant to act purposely and deliberately, rather than through mistake, inadvertence or other innocent reason, In short, that one is aware of what he is doing.

Wilfully has its ordinary meaning, to act intentionally with a bad purpose either to disobey or disregard the law.

Since an essential element of the crime charged is an explicit intent to defraud, it follows that good faith on the part of a defendant is a complete defense. The defendant, however, has no burden to establish a defense of good faith.

As I have told you before, and I told you at the very outset of this case, that the defendants were not required to produce any evidence.

The burden is on the government to prove fraudulent intent and lack of good faith. If you find that a defendant acted in good faith, in the honest belief that he was not concealing the truth and that he did not intend to defraud anyone, or to put it in terms of this case, if you are not satisfied beyond a reasonable doubt that the defendant knew the product was counterfeit, that would be a complete defense to the charge made here.

Finally, with regard to the element of intent to defraud, I think you may find some further explanation helpful in your deliberations. The question of a defendant's intent is a questionof fact which you are called upon to decide, just as you determine any other fact issue.

Intent involves the state of a person's mind, the purpose with which he acted at the time the acts in question occured. Guilty knowledge and especially intent to defraud rarely can be shown by direct evidence. Occasionally a man may write a letter or make a statement or do an act at a given period of time and say "this is what I intend." This is rather unusual. Usually intent is shown by circumstantial evidence.

We know you can't look into a person's mind and ascertain what his intent was. Often, the only way you may arrive at a conclusion as to a person's intent is by examining all the surrounding circumstances, including his acts, statements and so forth.

With regard to the third and last element, use of the mails for the purpse of executing the scheme or artifice. Before a defendant may be found guilty, the Government, in addition to the two essential elements just mentioned, must prove beyond a reasonable doubt the use of the mails in furtherance of the scheme to defraud. Here the government relies on various mailings which have been introduced in evidence.

It is not necessary to show that a defendant actually mailed any of the items referred to. This is not required, nor is it necessary that the scheme contemplated

the use of the mails. It is sufficient if you find that the defendant caused the mailing by others, and this does not mean that the defendant himself specifically authorized others to dothe mailing, where one does an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use of the mails can reasonably be foreseen, even though not actually intended, then he causes the mails to be used. The government must establish beyond a reasonable doubt that the particular mailing that is charged in each count was made during the existence of the scheme and in its furtherance.

However, it is not necessary that the government show all the defendants used the mails. A mailing caused by one of the defendants in the furtherance of the scheme to defraud binds all of the parties to the scheme if it could be reasonably foreseen that the mails would be used. Finally, the mail matter need not disclose a fraudulent representation on its face.

This concludes my explanation of the elements of mail fraud charged in the first two counts of the indictment. Before continuing, I want to explain to you a theory of law referred to as "aiding and abetting."

With regard to counts one and two of the indictment, the government relies upon a statute which reads in relevant

part as follows:

"Whosoever commits an offense... or aids, abets, or counsels, commands, induces or produces its commission", is punishable as a principal.

This means that not only is the person who actually commits an illegal act, the principal, punishable, but anyone who aids and abets him in committing that illegal act is likewise punishable.

Accordingly, you may find the defendants Donovan and D'Amato guilty of the offense charged if you find beyond a reasonable doubt that the offense was committed and that the defendants aided and abetted in its commission.

In determining whether or not the defendant aided and abetted the commission of the offense you may ask yourselves these questions:

Did he associate himself with the venture?

Did he participate in it as something he wished to bring about?

Did he seek by his action to make it succeed?

If he did these things, then he is an aider and abettor.

However, the mere association or friendship between the defendant and an alleged principal is not sufficient to establish one as an aider and abetter.

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Moreover, mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely spectator.

For count three, which involves only the defendant D'Amato, the statute involved in this count is Section 1001 of Title 18, United States Code. Section 1001 reads:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully makes any false, fictitious or fraudulent statements or representations..." commits a crime.

Count three of the indictment reads as follows:

"The grand jury further charges:

"On or about the 8th day of August, 1972, in the Southern District of New York, Dennis D'Amato, the defendant, in a matter within the jurisdiction of a department of the United States, to wit, the United States District Court for the Eastern District of New York, unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements and representations in an "Affidavit" to wit, that he had purchased 1,130 dozen jars of Ultra Sheen hair conditioner in October, 1971, from a company called Balzac Trading and had sold that Ultra Sheen to the customers

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listed in the affidavit, whereas in truth and in fact, as the defendant then and there well knew, such statements were false, fictitious and fraudulent."

Before you may find the defendant D'Amato guilty of the crime charged in count three of the indictment, you must be satisfied that the government has proved each of the following elements beyond a reasonable doubt:

1. That on or about the date specified, in the Southern District of New York, the defendant made or caused to be made a statement.

2. That the statement contained false and fictitious writings and representations.

3. That the false statement was knowingly and wilfully made.

4. That the statement or representation was made in a matter within the jurisdiction of a department or agency.

Now, a statement is false or fictitious if it is untrue when made, and then known to be untrue by the person making it or causing it to be made. A statement or representation is fraudulent, if known to be untrue, and made or caused to be made with the intent to deceive the government agency to whom submitted.

The word false must be considered together with the words Knowingly and wilfully. An act is done knowingly if

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done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. An act is done wilfully if done voluntarily and intentionally and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

The word knowingly is added in order to insure that no one would be convicted who made or caused to be made a statement or representation which was false because of mistake or accident or other innocent reason.

If you find that the accused did not knowingly and wilfully make any false statements or cause any to be made, you should acquit the accused.

I charge you that, as a matter of law, the submission of the affidavit to the United States District Court for the Eastern District of New York is a matter within the jurisdiction of a department of the United States. If you find that these documents were submitted to that court, then this element of the crime is satisfied and you must find that this matter was within the jurisdiction of a department or agency of the United States.

Those are the specific charges, but before letting you go for deliberations, I want to give you a few additional charges.

I have told you that the government has the burden of proving guilt beyond a reasonable doubt and naturally you would ask, "What is a reasonable doubt?"

The words almost define themselves. That there is a doubt founded in reason and arising out of the evidence or lack of evidence. It is a doubt which a reasonable person has after carefully considering all the evidence.

A reasonable doubt is not a vague or speculative or imaginary doubt. It is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience, and your judgment. It is a doubt which would cause a reasonable man or woman like yourselves to hesitate to act in relation to your own important private affairs.

Mere suspicion will not justify conviction. Suspicion is not a substitute for evidence, nor is it sufficient if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the government must prove guilt beyond all possible doubt. But the proof must be of such convincing character that you would be willing to rely and act on it in the important

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affairs of your own lives.

In sum, a reasonable doubt exists whenever, after a fair and impartial consideration of all of the evidence before you, you can candidly and honestly state that you do not have an abiding conviction that the defendant is guilty of the charge.

Now, there has been evidence introduced in connection with cout three of the indictment concerning an affidavit of the defendant D'Amato containing a number of statements tending to show that he was not involved in any scheme to defraud by selling counterfeit Ultra Sheen.

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness ofguilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

As I indicated to you before, a statement or an

act is knowingly made or done, if made or done voluntarily and intentional, and not because of mistake or accident or other innocent reason.

As I have indicated before, and this is not to over-emphasize it, but you must always bear in mind that the-lawnever imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, with respect to the credibility of witnesses, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand.

Consider also any relation each witness may bear to either side of the case; the manner in whixh each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or countradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses,

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may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood.

If you find that any witness has testified falsely, you can do one of two things. You can either reject all of that witness' testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be credible and reject only that part which you believe to be tainted by falsehood. That is what the law says you can do with the testimony of a witness whom you believe testified falsely while on the witness stand.

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party.

However, no such conclusion should be drawn by you with regard to witnesses who are equally available to both

parties, or where a witness' testimony would be merely cumulative.

The jury will always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

I told you when we were in the process of selecting you as jurors, a defendant is not required under our laws to prove his innocence, he is presumed to be innocent at all times and through the entire trial, unless and until the government proves him guilty beyond a reasonable doubt. For these reasons, a defendant need not take the witness stand and testify in his own behalf.

Therefore, the fact that the defendants did not testify at this trial does not create any presumption against either of them, and I charge you that this fact must not weigh in the slightest against either defendant, nor shall this fact enter into your discussions or deliberation in any manner.

I ask you as judges of the facts, and I do not want to encroach on your function in this respect, please do not discuss the question of possible punishment. That is a matter that rests on my conscience and my conscient alone, because the judge and the judg e alone is the one that has the obligation of imposing sentence, when and if guilt is determined.

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If you do discuss it amongst yourselves then you are encroaching on my job, and I ask you not to do it. Your job is to consider the facts and to determine the facts, and my job is to pass upon the law, and in the event of conviction to impose sentence.

If you find on all the evidence, that the evidence respecting a defendant leaves a reasonable doubt as to his guilt, you should not hesitate for a moment to return a verdict of acquittal as to that defendant.

However, on the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate, because of sympathy or because of any other reason, to render a verdict of guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if con-

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vinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges, judfes of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

If it becomes necessary during your deliverations to communicate with the court, you may send a note by the marshall, signed by your foreman, or by one or more members of the jury. No member of the jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open court.

You will note from the oath to be taken by the marshals that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after yo have reached an unanimous verdict.

Again, I want to remind you that nothing said in these instructions is to suggest or to convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

I indicated to you that you will have available for you a copy of the indictment, and I have prepared a form of verdict which I neglected to have typed up before I came here and Iwas going to go through this with you and pass it on to counsel and ask them if they have any objection to my submitted the form of verdict to the jury.

MR. O'BRIEN: No objection.

MR. SHARGEL: No objection.

MR. WILSON: No, sir.

THE COURT: All right. I hope you can read my writing and I would like you to follow the form of verdict when you report your verdict.

I have put it this way, "on count one, we, the jury, unanimously find the defendant Robert Donovan" and I left a blank. And on count one, "we, the jury, find the defendant Dennis D'Amato" and I left a blank. All the way through, that is the usual way you report your verdict.

You may have the indictment and you may have any testimony re-read to you, or you may have any exhibits that

have been received in evidence.

You may have any parts of my charge re-read to you if you wish it and all thatis required is to send a note through the marshal to me.

Before I send you out, counsel have an opportunity to make, in your absence, any requests or exceptions to my charge. So if you will wait just a moment, we will take those at the side bar.

(At the side bar.)

MR. O'BRIEN: I have to take exception to your honor's definition of the third element of the mail fraud and that is causing or the use of the mails in the execution of the fraud.

In particular, I take exception and I will try and condense this and do it as quickly as possible, to your statement that it is not necessary that the scheme contemplate the use of the mails and that the defendant intended the mails to be used. And also your Honor said something about if it was a normal business practice, then that would involve the use of the mails.

Also, that part -- I don't know if I got it correctly -- defining the causing and I would specifically request to satisfy me, that you charge at least all or part of the causing that I have requested in my request number 2,

and that the mails were used for the purpose of executing the fraud as I have requested in my numbers 5 and 7.

In addition, there is a Second Circuit case which puts forth a fourth element that someone must have been defrauded in the mail fraud and I think I cited this in my requests to charge which I submitted to the court.

That is it.

MR. SHARGEL: I respectfully except to that portion of your Honor's charge regarding the instruction on the defendant's knowledge or the failure to charge that the defendant D'Amato must have either used the mails or knowingly caused the mails to be used and that the frame of reference of proof that he had to have actual knowledge that the mails were used.

I further except to that portion of your Honor's charge where you defined circumstantial evidence and specifically, my exception with regard to reasonable doubt.

That is, the failure to charge the jury that circumstantial evidence must satisfy the jury beyond a reasonable doubt and exclude every hypothesis of innocence.

I except to that portion of your Honor's charge regarding count three of the indictment, the false statements, in that I believe your Honor failed to charge the jury that the falsity of the statement must be as to a material fact.

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That is all I have.

MR. WILSON: The government has norequests and I don't believe we can take exceptions.

THE COURT: I wiil refust to charge except as charged.

That is as far as the exceptions. Are there any additional requests?

MR. SHARGEL: I have a request that your Honor give the jury the materiality aspect of the falst statement.

THE COURT: All right.

(In open court.)

THE COURT: In one way I have a happy thing to do and that is to report that our jury is intact and the twelve original members are still with us. I am going to excuse the two alternates who have been so attentive here and I know how difficult it is for you to sit here and get to this stage of the proceedings and not join in the final deliberations with your co-jurors.

But yours is a very necessary function to this entire process and I appriciate very much your attention to this case and your being here.

(Alternate jurors excused.)

THE COURT: I suggest when lunch does arrive --I thought it would be here by one o'clock, you take your time

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 73 Cr. 1093
	)	
DENNIS D'AMATO	)	

On this 28th day of May, 1974, came the attorney for the government and the defendant appeared in person, and by Gerald Shargel, Esq.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements and representations in an affidavit, to wit, that he had purchased 1,130 doxens (sic) jars of Ultra Sheen hair conditioner in October, 1971, from a company called Balzac Trading and had sold that Ultra Sheen to the customers listed in the affidavit, whereas in truth and in fact as the defendant then and

there well knew were false. (Title 18, U.S. Code, Section 1001.), and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted in count 3.

IT IS ADJUDGED that the defendant is sentenced to the custody of the Attorney General for imprisonment for a period of sixty days (60). Execution of prison sentence is suspended and the defendant is placed on probation for a period of eighteen (18) months, subject to the standing probation order of this Court.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer

of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ LEE P. GAGLIARDI
United States District Judge

/s/ Raymond F. Burghardt
Clerk

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA,

v.

No. 73 CR 1093

DENNIS D'AMATO,

Defendant.
----------X

S I R :

PLEASE TAKE NOTICE that the defendant, DENNIS D'AMATO hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment of conviction entered against him by the Honorable Lee P. Gagliardi on May 28th, 1974, wherein the defendant on his conviction of one count of violating Title 18, United States Code, Section 1001, was given a prison sentence of sixty days, the execution of which was suspended and placed on probation for eighteen months.

Dated: New York, New York
May 29th, 1974

Yours, etc.,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant
DENNIS D'AMATO
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
687-4100

By:_____
A Member of The Firm

TO:
HON. PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Defendant's Address:
63 Oneida Avenue
Centereach, New York

Service of ~~three (3)~~ Two(2) copies of the within
is hereby admitted

this day of

.....

Attorney(s) for